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A N
I N V E S T I G A T I O N
OF THE
NATIVE RIGHTS
OF
BRITISH SUBJECTS.

*Majer hæreditas venit unicuique nostrum a
jure et legibus, quam a parentibus.*

C I C.

L O N D O N :

P R I N T E D for the A U T H O R ;

And sold by R. BALDWIN, No. 47, Paternoster-row ;
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M. D C C, L X X X I V.

To the READER.

JEALOUS and tenacious as this nation ever has been of its rights and liberties, it is truly astonishing, that so many individuals should be ignorant of the manner, in which their title accrues to the enjoyment of them. The general knowledge of these rights and liberties, is familiar to every description of persons throughout the kingdom: nor shall the most insignificant subject be impeded, molested, or cramped in the

A 2 enjoyment

enjoyment of any one of them, but the nation will often take up as a common cause, the attempt to invade the rights and liberties of an Englishman. We have seen the greatest ferments raised in the nation, by the illegal or injudicious exertion of power over the subject on one side, and the inconsiderate or unwarrantable resentment of a free people on the other. The spirit of freedom, which pervades most parts of the kingdom in the present age, falls very short of licentiousness: yet however the principles of true liberty, are so universally received, that the nation will undoubtedly sacrifice every other consideration, rather

ther than countenance a doctrine destructive of liberty. The natural and civil rights of mankind have been within this century, more thoroughly investigated, than they had been in former ages; though the means of asserting them, in some instances, may have been more violent, than the nature of the claim would justify. Such instances should rather encourage, than check the legal investigation into those laws, which give the rights.

No point of our law more intimately affects individuals, than that, which gives and ascertains the rights of a natural born subject: no point, which hath been less attended to: few
points

points more clearly decided in fact ;
and few which have retained the appearance of more obscurity.

It is no less certain than unaccountable, that much obscurity has for many years continued to eclipse the light of the case. The author does not presume to determine whether the darkness, in which the doctrine attempted to be supported in the following sheets, seems to have been immerged, arose from party prejudices, or from the want of an impartial investigation. Be it now his province to investigate the law with impartiality, and to disclose it without ambiguity.

in

In the pursuit of this attempt, he was penetrated, as he hopes his readers will also be, with Lord Coke's axiom, that

Neminem oportet esse sapientialem legibus.

E R R A T A.

Page 3, line 3, omit the words *and last*.

Do. 70, — 11, omit *their*.

Do. 115, — 10, instead of *father* read
ether.

I N V E S T I G A T I O N , &c.

IN the *civilized* state of society there must necessarily exist some degree of subordination, by which the multitude shall be subjected to a superior power; yet so congenial are the laws of civil society with those of pure nature, that no man shall be compelled to subject himself to a superior power, without receiving an adequate compensation for admitting such a superiority of his fellow creatures over him, which the law of Nature knew not, but which civilized society requires. Within the dominions of each separate nation, there are certain benefits and advantages to be possessed and enjoyed by the native *indigene*, from which aliens, born out of such dominions, are excluded. The title and admission to these benefits and advantages in this country, are the native rights of which the author means to treat.

At the instant of birth, the right of being a natural born subject accrues to the infant, and he becomes intitled to the benefit and protection of our king, laws, and constitution, if the place of his birth was then within the dominions of the king of Great-Britain. Thus is every British subject born a *debtor*, by the faith, fidelity, fealty, loyalty, ligeance or allegiance which he owes his sovereign and the state; and a *creditor*, by the benefit and protection of the king, laws, and constitution. Now although these original and native qualities of *debtor* and *creditor* are simultaneous and correlative in their commencement, yet are they not necessarily so in their duration: the former is on the part of the subject, indefeasible and indelible: the latter is conditional and defeasible. In a word, the subject may do acts, by which he shall forfeit his *credit* or right to protection, but cannot of himself by any means defeat the *debt* of ligeance, which he owes to the king and state.

My

* My Lord Coke says that "Ligeance is a true and faithful obedience of the subject *due* to his sovereign:" and the interest, which the crown hath in this debt of the subject is such, that it shall not be diminished, suspended, or done away, but by the express words of the sovereign, or the united concurrence of the legislature: it can never therefore be said of any man, that he is out of the ligeance of his lawful sovereign; for whilst he has life, he must retain that debt, which he contracted at his birth. As a subject of the country in which he was born, he is amenable to the laws of his native land, by the infringement or neglect of which, he may incur a forfeiture of his right to the protection of his sovereign, laws and constitution. It is indeed true, that *protectio trahit subjectionem, & subjectio protectionem*; yet not indefeasibly so on both sides. Sir Mathew Hale says, † "That the natural born subject of one prince can-

* Calvin's Case 5. † Hale's Pl. C. 68.

“ not by swearing allegiance to another
 “ prince, put off or discharge him from
 “ that natural allegiance ; for this na-
 “ tural allegiance was intrinsic and pri-
 “ mitive, and antecedent to the other,
 “ and cannot be divested without the
 “ concurrent act of that prince, to
 “ whom it was first due.” Hence it is
 that whenever a natural born subject,
 who has entered into the service of a
 foreign power, is taken in open war,
 he is indictable for high treason, which
 in all our books is constantly said to be
contra ligeantiae debitum.

This right and interest in the lige-
 ance of the subject being then, as we
 have seen, indefeasibly vested in the
 crown for the benefit of the state, it
 will not be improper to consider more
 minutely in what they consist. The
 power of a state generally depends up-
 on the number, industry, and abilities
 of its subjects ; and Bracton, talking of
 them, * says, *vita & membra sunt in*
potestate regis : and my Lord Coke †
 properly alledges the reason for it ;

* Bract. L. 1. Fo. 6. † Co. Lit. 127.

“ to the end that they may serve the
 “ king and their country when occa-
 “ sion shall be offered.” In cases of
 self murder, and even of self mayhem,
 the *civil* guilt of the crime consists
 merely in the injury thereby done to
 the state; all which proves uneontro-
 vertibly the inherent and indefeasible
 right of the crown to the ligeance of
 every person born within its domi-
 nions.

Now although an attainder for high
 treason, for instance, shall deprive the
 attainted person of his beneficial in-
 terest in the allegiance, (which with
 propriety should be termed *protection*),
 yet is it clear and indisputable, that
 the crown, without an express act
 of parliament, does not in such case
 lose any part of it's interest in the li-
 geance of the person attainted: nor in
 case of his pardon would the crown ac-
 quire any new right or dominion over
 him: his future blood indeed would be no
 longer corrupted, and he himself would
 be readmitted to the benefit of that pro-
 tection, which he before had forfeited.

It

It was never supposed by the ancient writers upon our laws, that any person could be out of the ligeance of the king, but as Bracton expressed it in the days of Henry the III * *propter defectum nationis*; or as Fleta did in the time of Edward the I † *cò quod est ad fidem regis francie*. This will appear clear from the words of the indictment in cases of high treason, where if the person committing treason be a natural born subject, the words of the indictment run, *contra regem naturalem Dominum suum*, and conclude with *contra ligeantie sue debitum*: but if the person be not a natural born subject, then the words *naturalem Dominum suum* are omitted, and the latter words *contra ligeantie debitum* are inserted only to shew his *local* allegiance to the sovereign, against whom he had committed the offence.

For it is to be observed, that allegiance is either natural and perpetual,

* Brac. Tract. de Excep. c. 24. fo. 427.

† Fleta, l. 6. c. 471.

‡ Calvin's Case, ubi supra.

or local and temporary, according to the birth or residence of the parties who owe it. When the legislature requires promises, oaths, or other external professions of allegiance from subjects, it imposes upon them no new obligation; but it is done merely to add solemnity and notoriety to that obligation, which each individual assumed at his birth, by superadding the test of religion to the force of native allegiance.

Upon the foregoing principles is it, that no letters of denization, or even act of naturalization by parliament, can dissolve the native allegiance, which the denizen or person naturalised owed to his former sovereign: whence he must for ever retain a difference from the real native subject born in the king's dominions: though such denizens or persons naturalised may claim from us a right of being treated as our subjects in consequence of the mutual obligations introduced by the Letters of Denization, or Act of Naturalization. No man certainly can transfer the right,
which

which his native sovereign hath in him, to a foreign prince, *non potest patriam in quâ natus est exuere, nec ligeantiæ debitum ejurare*, saith my lord Coke; * with which agrees the maxim, *jus originis nemo mutare potest*. †

It is a settled point, that allegiance is co-extensive with the dominions of the sovereign, ‡ and is due to the king in his natural capacity : and since the determination of Calvin's case, in which the idea of one local allegiance for the natural subjects of England, and of another local Allegiance for the natural subjects of Scotland was exploded and defeated, every person born within the dominions of the king of England, whether in London or Dublin, Scotland or Jersey, in Hanover or Quebec, is under the protection, consequently at the ligeance of our King, and thereby capable of taking lands in England by descent or purchase, and of enjoying all the other Rights

* 1st Inst. 129.

† State trials, vol. 1. Trial of the duke of Hamilton.

‡ Calvin's case, ubi supra.

and

and liberties of an Englishman. Nay even, if a subject be abjured the realm,* “ Notwithstanding this abjuration, he oweth the King his ligeance, and he remaineth within the the King’s protection ; for the King may pardon and restore him to his country again.” And the further inference evidently is, that the King has still a right to his personal services, if he call for them, and therefore still remains he, at the faith and ligeance of the King.

This doctrine has been uniformly admitted through a succession of centuries : A more decisive instance cannot be brought to establish it, than the case of Sir Walter Raleigh. † He was attainted of high treason in the year 1603, and after sentence had passed upon him, he was confined to prison for 12 years : he was then released,

* Calvin’s Case 9.

† Cro. Jac. 495. State Tryals 1 vol. Rymer’s *Fœdera* Tom xvi. p. 798. See also Rapin, Wellwood, Wilson, Smollet, Hume, &c.

and the King having occasion for his services, appointed him Admiral of a fleet of 12 sail, by commission under the Great Seal, † “ for a voyage to
 “ Guiana; and after his return he
 “ was remanded to the tower: the record of the attainder being brought
 “ and certified into the King’s Bench;
 “ was by Habeas Corpus directed to
 “ the Lieutenant of the Tower,
 “ brought unto the bar, where Yelverton, the King’s Attorney, shewed
 “ how by the King’s favor he had lived thus long, and had since done
 “ acts, for which in justice he ought not
 “ to be further spared; and the King
 “ had given him command to pray execution; wherefore he now prayed execution of this judgment for the king;
 “ and hereupon Sir W. Raleigh being
 “ demanded what he could say, why
 “ the court should not proceed and
 “ grant execution against him, answered, that he could not deny but that
 “ he was attainted of treason as aforesaid, yet he supposed having com-

† Croke Jac. 495.

“mitted no other acts since, the King
 “would not cause execution upon the
 “former judgment; and he conceived
 “that in regard the King had granted
 “him so large a commission for his Ma-
 “jesty’s and the realm’s service, and
 “thereby had given him authority to
 “execute judicial law and power over
 “the lives of others, that it was a dis-
 “pensation unto him for his former of-
 “fences, and he ought not now to be
 “called in question for them. But
 “the court replied unto him, that he
 “being attainted of treason, there
 “could not be any discharge thereof,
 “but by the King’s express pardon,
 “and no treason could be pardoned
 “but by express words mentioning
 “it: and the King *might use the ser-*
 “*vice of any of his subjects in what em-*
 “*ployment he pleased, and it should not*
 “*be any dispensation for former offences.*”

And thereupon Montague, Chief Jus-
 tice, commanded that execution should
 be done according to the first judg-
 ment, which was done accordingly;
 Sir Walter being executed on the 29th

Day of October, 1618. From this judgment of the court of King's Bench, we must necessarily conclude, that an attainted person still remains at the ligeance of the King ; for *he* only is a subject of the King, who is at the ligeance of the King : here the court admits Sir W. Raleigh (tho' attainted) to be a subject of the King, and therefore that the King had a right to employ him in the service of the state : All which could not be, if Sir W. Raleigh did not remain at the ligeance of the King ; for where there is no ligeance, there can be no sovereignty. This doctrine of the court of King's Bench in the year 1618, is so far from being antiquated, that it is strictly consonant with the principles laid down by a very learned and respectable writer, about the middle of the present century. * “ It is a principle in all states “ where a man is neither a subject by “ birth, &c. to consider him as not with-

* Considerations on the law of forfeiture. p. 76: in

“ in their obedience or even notice.
 “ *But where he has forfeited his civil*
 “ *rights by crime, he is regarded as still*
 “ *subject to their power, and in every ref-*
 “ *pect within the strict consideration of the*
 “ *law.*”

There is preserved in the library of Lincoln's-inn, an ancient manuscript, written in the days of Queen Elizabeth, which is intituled, “ Certain Errors upon the statute made 25th Edward 3. of children born beyond the sea, conceived by Serjeant Brown, and confused by Serjeant Fairfax, in nature of a dialogue,” which contains the following lines, not wholly unapplicable to the subject under our present consideration : “ The word ligeance is sometimes taken for the Prince's dominion and territory, because the people born within the same are liege subjects ; but ligeance in it's most proper & natural signification is the bond of faith, and swallowing up all and the greatest among creatures (religion to the creator excepted) done
 “ by

“ by the law of God and nature from
 “ the subject to the Prince and coun-
 “ try, and by the Prince to his country,
 “ and to the universal state of the same
 “ republic ; therefore the word liege
 “ is common as well to the King, as sub-
 “ ject. Mr. Rastall, with others, con-
 “ firmeth these significations in defining
 “ an alien. An alien, saith he, is he,
 “ whose father and himself is born out
 “ of the ligeance of the Lord our King ;
 “ here he meaneth the territory of
 “ England : for he addeth, if an alien
 “ cometh and dwell within England,
 “ and marrieth and hath issue, as who
 “ should die within our land, the King’s
 “ territory of England, this issue is not
 “ an alien, but english. Likewise
 “ Hussey declareth his mind and sen-
 “ tence in law upon this statute, which
 “ saith, children whose fathers and mo-
 “ thers at the time of their birth be at
 “ the faith and ligeance of the Kings of
 “ England, useth these words, *Children*
 “ *born of father and mother english ;*
 “ whereby

“ whereby he giveth us to understand
 “ that the statute treateth of liege
 “ subjects.”

Thus far have we considered allegiance as founded in the law of civilized nature, which is in order paramount to any particular municipal or written law whatever.* *Jus naturale est, quod apud omnes homines eandem habet potentiam.* We will next consider how the law of England originally stood, how it hath in process of time been varied and altered, and how it now stands as to the rights of natural born subjects. This general law of fealty or allegiance being of civilized nature, is invariable and immutable. † *Jura naturalia sunt immutabilia.* So transcendent then is this first law of civilized nature, that it is the very fountain and basis of all human laws whatever; for ‡ *frustra feruntur leges nisi subditis & obedientibus.*

* Arist. Lib. 5. *Æthic.*

† Dr. & Stud. 4.

‡ Carter 130.

It would be to prop Olympus with a straw, were I to attempt to add reasons and authorities to the very clear and decisive determination of the court upon this point in Calvin's case: it should be attended to, that the twelve judges of England, and the lord chancellor, were unanimous in determining this case, and that Lord Coke, who reports it, was then lord chief justice of the Common Pleas, and one of the judges who gave their opinions upon it. " If
 " a man be attainted of treason or felony, he hath lost the King's legal protection, for he is thereby utterly disabled to sue any action real or personal, (which is a greater disability than an alien in league hath) and yet
 " such a person so attainted, hath not lost that protection, which by the law of nature is given to the King, for that is *indelebilis & immutabilis*;
 " and therefore the King may protect and pardon him; and if any man kill him without warrant, he shall be
 " punished

“ punished by the law as a man slayer,
 “ and thereunto accordeth 4 Edw. 4.
 “ and 35. Hen. 6. 57. 2 Afs. Pl. 3.
 “ By the statute of the 25 of Edw. 3.
 “ c. 22. A man attainted in a *præmu-*
 “ *nire*, is by express words out of the
 “ protection of the King generally ; and
 “ yet this extendeth only to legal pro-
 “ tection, as it appeareth by Lit. f. 43.
 “ *for the parliament could not take away*
 “ *that protection which the law of nature*
 “ *giveth unto him :* and therefore not-
 “ withstanding that statute, the King
 “ may protect and pardon him. And
 “ though by that statute it was further
 “ enacted, that it should be done with
 “ him as with an enemy ; by which
 “ words, any man might have slain
 “ such a person (as it is holden in 24
 “ Hen. 8 Tit. Corone br. 197, until
 “ the statute made 5 Eliz. c. 1.) yet the
 “ King might protect and pardon him.
 “ A man outlawed is out of the benefit
 “ of the municipal law : for so saith
 “ Fitz. Nat. brev. 161. *Utlagatus est*
 “ *quasi extra legem positus :* and Bracton,

“ 1. 3. tract. 2. c. 11. faith that *caput*
 “ *gerit lupinum* : Yet is he not out either
 “ of his natural ligeance, or of the King’s
 “ natural protection ; for neither of
 “ them is tied to municipal laws, but
 “ is due by the law of nature, which
 “ as it hath been said, was long before
 “ any judicial or municipal laws.”

Notwithstanding this doctrine is laid down in such very clear and express terms, it seems as though it had either been totally disregarded or grossly misconceived, not only by private individuals, but by the legislature itself.

We have seen that every child contracts by its birth within the dominions of Great Britain a debt, which shall never be discharged or done away, but by a public or private act of the sovereign or state, to whom it is due. And so peculiarly jealous have our sovereigns been of this native prerogative or right, that in our history I have not been able to find one instance, in which this debt has been released to an individual.

They

They have indeed on frequent occasions dispensed with the payment of it for a time and under conditions, but never consented to a total extinguishment of it, as appears in the licenses, which have been frequently granted under the sign manual to individuals, to enter into the service of foreign princes.

The extent, to which this right of the crown to the ligeance of the subject, as well as the right of the subject to the benefit of protection, (if not forfeited by him) is indefeasible and immutable, ought particularly to be attended to: for it is not only so, whilst the country, in which he was born, remains under the subjection of the prince, to whom it was subject at the time of his birth, but for ever after.

No subsequent acquisition of a country by any prince or state, whether by conquest, inheritance, exchange or purchase, shall give this right to those, who were born during the possession of the former sovereign. Thus, for ex-

ample, every person born within any of the British colonies in America, before their independence was acknowledged by this country, is and ever will be a natural born subject of Great Britain, capable of inheriting lands in this country and claiming all the other rights of an Englishman. And for the same reason, every person born in Canada, whilst it remained under the subjection of the French king, cannot claim the rights of a natural born Englishman (although now a British subject,) without an express act of naturalization. The judgment of the court upon this point in Calvin's case, is thus expressed by my lord Coke * “ for as
 “ the antenati (*or those born before the*
 “ *union of the two crowns of England and*
 “ *Scotland*) remain aliens as to the
 “ crown of England, because they
 “ were born, when there were several
 “ kings of the several kingdoms, and
 “ the uniting of the kingdoms by

* Calvin's case, 27.

“ descent subsequent, cannot make
 “ him a subject to that crown, to
 “ which he was an alien at the time of
 “ his birth: so albeit, the kingdom
 “ (which Almighty God of his infinite
 “ goodness and mercy divert) should
 “ by descent be divided and governed
 “ by several kings; yet was it resolv-
 “ ed that all those, that were born
 “ under one natural obedience, whilst
 “ the realms were united under one
 “ sovereign, should remain natural
 “ born subjects and no aliens: for that
 “ naturalization due and vested by
 “ birth-right, cannot by any separa-
 “ tion of the crown afterwards be ta-
 “ ken away: nor he that was by judg-
 “ ment of law a natural born subject
 “ at the time of his birth, become an
 “ alien by such a matter *ex post facto*,
 “ and in that case, upon such an acci-
 “ dent our *post natus* may be *ad fidem*
 “ *utriusque regis* *.

* Bracton, fo. 427.

It is foreign from the purpose of this investigation, to enter into the discussion of this point, whether, *parliament can alter the laws of nature*: therefore the author has not adopted the idea of allegiance, being a law of nature, but only of social or civilized nature: it is not certainly in the power of any one man or any collection of men, to alter the laws of pure nature, which the creator has established: but as in the civilized state of nature, particular societies must essentially be liable to variations and changes; therefore does it become essentially necessary that in the civilized state of societies, there shall exist in each society a power of altering or modelling the general laws of civilized nature, according to the policy, wants and exigencies of each particular and respective society.

In this country, as nothing but an act of parliament can give the right of naturalization, so nothing, I apprehend,
can

can take it away: Sir Matthew Hale was of this opinion, as we have before seen.

I do not now speak of that forfeiture of protection, which a subject may incur by his own contempt or infringement of the law. And as there is vested in the supreme legislature that transcendency of power, which shall control the common law of the land, and adapt it to the exigencies and policy of times and occasions, it seems wholly unaccountable, in the multifarious events, revolutions and treaties, whether the consequence of them has been the aggrandizement or diminishment of the empire, that no attention hath ever been paid to the effects of the law as it now stands. It cannot be said more clearly, than it hath been expressed by my lord Coke, that our new subjects of an acquired country remain as aliens incapable of enjoying the benefit of our laws and constitution, and cannot be admitted unto the full
parti-

participation of them without an express act of naturalization by parliament; thus by becoming subjects to the king of England they stand in need of the same qualification to entitle them to any advantage of our laws, which they did, whilst they remained under the subjection of their former sovereign. And on the other hand, our late subjects of a lost country continue to partake of the plenitude of all our rights, privileges and liberties, after all benefit and advantage arising to the state from their services is totally done away and transferred, perhaps to our enemies. Thus destroying the reciprocity of allegiance and subjection, we acquire subjection without an obligation of granting protection, and are bound to protect those, who are no longer under our subjection. If in such cases then, the legislature should in their wisdom and policy, find the legal consequences of the want of a claim to be unjust, on the one hand, and of the
the

the right to claim to be unreasonable on the other ; why not upon the acquisition of a country pass a general act for naturalizing all the inhabitants thereof,* and upon the loss or cession of a country, pass a general act for releasing the inhabitants thereof from their original and native debt of ligeance, extinguishing the right and interest of our sovereign in his former subjects, withdrawing the protection which we were formerly bound to give them, and placing them in every future respect as aliens. Assuredly the natural rights of his Majesty's subjects, are more worthy of the investigation and

* After the union of the crowns of England and Scotland, the parliament of Ireland saw the propriety of such an act, and accordingly made a general act for naturalizing all the *antenati* of Scotland. One of the Ramfay family being an *Antenatus* in Scotland, pleaded the benefit of this statute, to qualify him to inherit in England ; but the court held that an Irish act of parliament, extending not to England, he remained incapable of taking his inheritance in England ; as it is fully reported by lord Vaughan. *Shaw v. Ramfay.*

attention of the legislature, than the breed of cattle or preservation of game. But I am unvoluntarily digressing from the investigation of a point of law, into an interference with the politics of the nation. A natural transition will bring me back to my subject : and this will be the consideration of the actual interference of the legislature on the subject.

The old common law of this country, knew no other than this general law of civilized nature, that *birth alone*, within the dominions of a particular sovereign, could give the person so born the right of being a natural born subject of that particular state. In the policy of succeeding times, it was frequently found expedient to extend the benefit of being a natural subject to individuals, who by their foreign birth, were by the common law precluded from it. This was done by letters patent of denization, or by act of parliament for naturalization. My lord
Coke

Coke states the difference between them. *Denizen* in the least common sense of the word, importeth a person born within the ligeance of the King, *quasi deius nre* ; but in the more common acceptation of the word,* “ is taken for “ an alien born, that is infranchised or “ denizated by letters patents, where- “ by the King doth grant unto him, “ *quod ille in omnibus tractetur habeatur,* “ *teneatur & gubernetur, tanquam* “ *ligeus noster infra dictum regnum nre-* “ *trum anglie oriundus & non aliter nec* “ *alio modo.* But the King may make “ a particular denization : as he may “ grant to an alien, *quod in quibusdam* “ *curiis suis anglie audiatur ut anglus,* “ *& quod non repellatur per illam excepti-* “ *onem, quod sit alienigena & natus in par-* “ *tibus transmarinis,* to enable him to sue “ only. The several senses of which “ word must be gathered *ex anteceden-* “ *tibus adjunctis & consequentibus,* and

* Co. Lit. 129.

“ they that take him in that sense de-
 “ rive the word from *donaiſon*, *donatio*,
 “ becauſe his freedom is given unto
 “ him by the King. There is another
 “ kind, and that is an alien naturalized,
 “ and that muſt be by act of parliament.
 “ And this alien naturalized to all in-
 “ tents and purpoſes, is as a natural
 “ born ſubject, and differeth much
 “ from denization by letters patents :
 “ for if the iſſue of an Engliſhman born
 “ beyond ſeas, be naturalized by an act
 “ of parliament, he ſhall inherit his
 “ father’s lands ; but if he be made
 “ denizen by letters patent, he ſhall
 “ not ; and many other differences there
 “ be between them.”

The firſt act of parliament, which in
 any manner affected the right of the
 children of engliſh parents born beyond
 the ſeas, out of the ligeance of the
 crown of England, was the 25th. of
 Edward the 3d. ſt. 2. which is conceived
 in the following words : “ Our lord
 “ the King at his parliament holden at
 “ Weſtmiſter,

“ Westminster, at the utas of the
 “ purification of our lady, in the year
 “ of his reign the 25th, and of France
 “ the 12th, considering the great mis-
 “ chiefs and damages which have hap-
 “ pened to the people of his realm of
 “ England, as well because the statutes
 “ ordained before this time, have not
 “ been holden and kept as they ought to
 “ be, as because of the mortal pestilence
 “ that late reigned ; and willing to
 “ provide for the quietness and common
 “ profit of his said people, convenient
 “ remedy ; therefore by the assent of
 “ the prelates, earls, barons, and other
 “ great men, and all the commons of
 “ his said realm, summoned to the
 “ parliament, hath ordained and esta-
 “ blished the things underwritten, viz,
 “ Because that some people be in doubt
 “ if the children born in the parts be-
 “ yond the sea, out of the ligeance of
 “ of England, should be able to demand
 “ any inheritance within the same
 “ ligeance or not ; whereof a petition
 “ was

“ was put in the parliament late holden
 “ at Westminster, the 17th year of the
 “ reign of our sovereign lord the king
 “ that now is, and was not at the same
 “ time wholly assented : our lord the
 “ king willing that all doubts and ambi-
 “ guities should be put away, and the law
 “ in this case declared and put in a cer-
 “ tainty, hath charged the said prelates,
 “ earls, barons, and other wise men of
 “ his council, assembled in this parlia-
 “ ment, to deliberate on this point : all
 “ which of one assent have said, that
 “ the law of the crown of England is,
 “ and always hath been such, that the
 “ children of the kings of England, in
 “ whatsoever parts they be born, in
 “ England or elsewhere, be able and
 “ ought to bear the inheritance after
 “ the death of their ancestors; which
 “ law our said lord the king, the pre-
 “ lates, earls, barons, and other great
 “ men, and all the commons assem-
 “ bled in this parliament, do ap-
 “ prove and confirm for ever. And in
 “ the

“ the right of other children born out
 “ of the ligeance of England in the
 “ time of our lord the king, they be of
 “ one mind accorded, that Henry son
 “ of John de Beaumont, Elizabeth
 “ daughter of Guy de Bryan, and Giles
 “ son of Ralph Dawbeney, and other
 “ which the king will name, which
 “ were born beyond the sea, out of the
 “ ligeance of England, shall be from
 “ henceforth able to have and enjoy
 “ their inheritance after the death of
 “ their ancestors, in all parts within
 “ the ligeance of England, as well as
 “ those who should be born within the
 “ said ligeance. And that all children
 “ inheritors, which from henceforth
 “ shall be born without the ligeance of
 “ the king, whose fathers and mothers
 “ at the time of their birth be and shall
 “ be at the faith and ligeance of the
 “ king of England, shall have and enjoy
 “ the same benefits and advantages, to
 “ have and bear the inheritance within
 “ the same ligeance as the other inhe-
 “ ritors aforesaid in time to come ; so
 always

“ always that the mothers of such
 “ children do pass the sea by the licence
 “ and wills of their husbands. And if
 “ it be alledged against any such born
 “ beyond the sea, that he is a bastard,
 “ in case where the bishop ought to
 “ have cognizance of bastardy, it shall
 “ be commanded to the bishop of the
 “ place where the demand is, to certify
 “ to the king’s court, where the plea
 “ thereof hangeth, as of old times, hath
 “ been used in case of bastardy alledged
 “ against them, which were born in
 “ England.”

The next act, which in any manner
 concerned this matter, was made in
 the 5th year of the reign of Richard 2,
 by which, all manner of people, except
 only the lords and other great men of
 the realm, and true and notable mer-
 chants, and the king’s foldiers, were
 prohibited from going out of the realm
 without the special licence of the king,
 upon pain of forfeiture of all their
 goods. Whilst this act subsisted, it in
 some measure contracted the effect of
 king

king Edward's naturalizing act ; as will be seen hereafter.

This act of Richard was repealed by the 4th of king James the 1st, which again gave a general licence to all subjects indiscriminately to go out of the realm, according to the common law of the land. After this repeal of the act of Richard 2d, the statute of king Edward 3d, was of itself revived in it's full extent. Thus stood the law *de natis ultra mare* for several centuries; during which space of time, many cases were determined upon the construction of the statute of Edward 3d : of which notice hereafter will be taken.

No alteration was made in this law, until the 7th year of the reign of queen Ann : * when out of a great zeal to encourage the protestant religion, the legislature thought proper to naturalize every alien of any description whatsoever, who would take the oaths and subscribe the declaration appointed by the 6th of Ann, and receive the sacra-

* 7th An. c. 5.

ment of the lord's supper according to the rites of the church of England : and otherwise enlarged the foregoing act of Edw. 3d. by the following clause, " And be it further enacted by " the authority aforesaid, that the chil- " dren of all natural born subjects born " out of the ligeance of her majesty, her " heirs and successors, shall be deemed, " adjudged and taken to be natural " born subjects of this kingdom, to all " intents, constructions and purposes " whatsoever."

In the 10th year of queen Ann, an act was passed, which recites in the preamble, that divers mischiefs and inconveniencies had been found by experience, to follow from the last mentioned act of the 7th of queen Ann, to the discouragement of the natural born subjects of this kingdom, and to the detriment of the trade and wealth thereof, and therefore repeals the whole of the 7th of queen Ann, except the clause, which relates to the children of

of her majesty's natural born subjects
born out of her majesty's ligeance.

The next and last act of parliament
which was made concerning the rights
of the children of natural born subjects,
born out of the king's ligeance, was
the 4th of Geo. the 2d. c. 21, which
after reciting, that some doubts had
arisen upon the construction of the said
recited clause, in the 7th of Ann, for
the explaining of which, and to pre-
vent any disputes touching the true
intent and meaning thereof, enacts,
“ that all children born out of the lige-
“ ance of the crown of England, or of
“ Great Britain, or which shall hereaf-
“ ter be born out of such ligeance,
“ whose fathers were or shall be natu-
“ ral born subjects of the crown of
“ England or of Great Britain at the
“ time of the birth of such children res-
“ pectively, shall and may, by virtue of
“ the said recited clause in the said act
“ of the 7th year of the reign of her
“ said late majesty, and of this present
“ act, be adjudged and taken to be,

“ and all such children are hereby de-
 “ clared to be natural born subjects of
 “ the crown of Great Britain to all in-
 “ tents, constructions and purposes
 “ whatsoever.

“ Provided always, and be it further
 “ enacted, and declared, by the authority
 “ aforesaid, that nothing in the said
 “ recited act of the 7th year of her said
 “ late majesty's reign, or in this pre-
 “ sent act contained, did, doth, or
 “ shall extend, or ought to be construed
 “ adjudged or taken to extend, to make
 “ any children born or to be born out
 “ of the ligeance of the crown of Eng-
 “ land or of the crown of Great Britain,
 “ to be natural born subjects of the
 “ crown of England or of Great Bri-
 “ tain, whose fathers at the time of the
 “ birth of such children respectively
 “ were or shall be attainted of high
 “ treason, by judgment, outlawry or
 “ otherwise, either in this kingdom or
 “ in Ireland, or whose fathers at the
 “ time

“ time of the birth of such children
 “ respectively, by any law or laws
 “ made in this kingdom or in Ireland,
 “ were or shall be liable to the penal-
 “ ties of high treason or felony, in case
 “ of their returning into this kingdom
 “ or into Ireland, without the licence
 “ of his majesty, his heirs or succes-
 “ sors or any of his majesty’s royal
 “ predecessors, or whole fathers at the
 “ time of the birth of such children
 “ respectively, were or shall be in the
 “ actual service of any foreign prince
 “ or state then in enmity with the crown
 “ of England or of Great Britain; but
 “ that all such children are, were, and
 “ shall be and remain in the same state,
 “ plight and condition, to all intents,
 “ constructions and purposes whatsoe-
 “ ver, as they would have been in, if
 “ the said act of the 7th year of her said
 “ late majesty’s reign, or this present
 “ act, had never been made; any
 “ thing herein, or in the said act of the
 “ 7th

“ 7th year of her said late majesty’s
 “ reign contained to the contrary in
 “ any wise notwithstanding.”

It would have been unnecessary to attempt the interpretation of the statute of Edw. the 3d, had not the 4th of George the second expressly excluded several descriptions of persons from claiming under the 7th or 10th of Ann, or the said 4th of Geo. the 2d. If none of these three last mentioned acts had been made, all persons born of English parents out of the ligeance of the king of England, must have established their claim under the 25th of Edw. the 3d: if therefore that clause of the 4th of Geo. 2. has any effect at all, it is to drive several persons of the present generation, and may be more of the future, to claim their right of inheritance by the law, as it stood before the 7th of queen Ann had ever passed, and as it may stand with respect to them, until this hour, unaltered and unrepealed from the year 1349.

It

It is rather singular, that the 4th of Geo. 2, undertakes to explain the naturalizing clause of the 7th of queen Ann, under which the 4th of Geo. the 2d precludes them from claiming, and omits to explain that act of Edw. the 3d. under which it leaves them to claim: yet the former is conceived in terms more simple and less dubious than the latter: the intent, force, and meaning of words spoken only at the distance of twenty-three years, must be better understood and more obvious to every body, than of words spoken at the distance of 441 years. It is a matter of wonder, that a law, under which many persons now actually existing, and eventually any person in future, do or may be driven to claim the right of being a natural born subject of this country, should be as little attended to, as though it were obsolete or repealed.

In the construction of a statute, the first thing to be considered, is the nature

ture of it. This statute of the 25th of Edw. 3d, is partly *declaratory* of the common law, and partly *remedial* and *enlarging*. Of this there can be no question: for as to the first part of it, which relates to the birth of the king's children, it expressly saith, that the law is *and always has been such*, that in whatsoever parts they be born in England or elsewhere, they shall be able and ought to bear the inheritance after the death of their ancestors, and this being only a declaration of the common law, is thereby approved and affirmed for ever. For it was consonant with the dignity of the crown, that the legitimate issue of the blood royal should not be prejudiced by any circumstance dependant upon the place of their birth.

As to the other part of the statute which relates to the children of subjects born abroad, this cannot certainly be declaratory of the old law for these reasons: 1st, If it had been declaratory, it would have declared that
the

the law had been such before, and would have confirmed it, as it did in respect to the children of the king. 2dly, If by the common law of the land, such children born abroad could inherit, there was no necessity of their being naturalized, which was the chief end and intention of the legislature in passing the act. 3dly, It is certain, as will hereafter appear, that by the common law, the place of birth only gives the right of inheriting. The legislature then, knowing that by the common law every child born out of the ligeance of the crown of England, was rendered thereby an alien, and of course disabled to inherit lands in England, made a general naturalization act for the benefit of all future generations; thereby enlarging the common law of the land, in favor of the children of English subjects, born out of the ligeance of the king: and *remedying* the evil which was felt by the common law, which excluded thereby the issue of many noble and virtuous families

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from the service of the state, and impoverished the children of opulent parents, by disabling them to inherit their ancestors ; and thus is this statute remedial and enlarging. And this is strictly consonant with the rule laid down by my lord Coke,* where he says, “ That the most natural and “ genuine exposition of a statute, is to “ construe one part of the statute by “ another part of the same statute, for “ that best expresseth the meaning of “ the makers.” Thus from one part of this statute it appears, that before it passed, the king’s children, though born out of the ligeance of the crown of England, because they were natural born subjects, stood not in need of that naturalization, which by the other part of the same statute it appears, the children of subjects born abroad could not inherit without.

* Co. Lit. 381.

As the 25th of Edward 3d, has never been affected by any subsequent statute, besides that of Richard the 2d, (which continued only it's operation for 235 years) and being enlarged by the more general naturalizing clause of queen Ann, those persons who can claim under the more general unconditional words of queen Ann, will never certainly attempt to establish their claim under the 25th of Edward 3d; but if the 4th of George 2d; hath the effect of throwing several persons out of the benefit or operation of these three later statutes, then it becomes a matter of the most important consequence to individuals, to know the true sense, meaning, intent, operation, and effect of the 25th of Edward 3d: for such as it was to our ancestors who passed it in the year 1349, such is it to their posterity at this day, 434 years after it's passing into a law, to all intents, constructions, and purposes whatsoever.

My lord Coke in his report of Hey-

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don's

don's case,* tells us, that the court of
 exchequer unanimously resolved, " that
 " for the sure and true interpretation
 " of all statutes in general, (be they
 " penal or beneficial, restrictive or en-
 " larging of the common law) four
 " things are to be discerned and confi-
 " dered. 1st, What was the common
 " law before the making of the act.
 " 2d, What was the mischief and de-
 " fect, for which the common law did
 " not provide. 3d, What remedy the
 " parliament hath resolved and ap-
 " pointed to cure the disease of the
 " common wealth. And 4th, the true
 " reason and remedy : and then the of-
 " fice of all the judges is always to make
 " such construction, as shall suppress the
 " mischief and advance the remedy,
 " and to suppress subtle inventions and
 " evasions for continuing the mischief
 " *pro privato commodo*, and to add force
 " and life to the cure and remedy, ac-

* 3 Rep. 7.

" cording

“ cording to the true intent of the makers of the act *pro bono publico*.”

The 1st of these points carries it's evidence upon the face of the act itself : it is therefore needless to recur to other proofs or authorities ; the act expressly says, that by the common law before the making of the act, the children of the kings of England, in whatsoever parts they were born, whether in England or elsewhere, were able to bear the inheritance of their ancestors : and so far is the act merely declaratory as we before observed. But as to the children of subjects born out of the allegiance of the crown of England, although the act does not say in express words, what the common law was *before the making of the act*, yet it as evidently imports it by implication, as the most express words could have said it. It appears then by the act, that by the common law, every child (except the king's children) born out of the allegiance of the crown of England, was an alien :

alien : otherwise why find it necessary to naturalize the persons named in the act, and all future generations under the same circumstances, by these words, “ Shall be from henceforth able to have “ and enjoy their inheritances after the “ death of their ancestors in all parts “ within the ligeance of England, as “ well as those that should be born “ within the same ligeance ?” Now the difference here pointed out between persons born within and without the ligeance of the crown of England, is, that the one by the common law, was capable of taking and enjoying an estate of inheritance in England, and the other was not. It is without question, that the ability to take and enjoy an inheritance in England, comprizes the full extent of the benefit of being a natural born subject, to all intents, constructions and purposes whatsoever. Thus in the following case : * “ Hull “ and his wife brought a writ of dow-

* 3 Hen. 6. c. 55.

“ er : the tenant pleaded that the same
 “ was an alien : the demandants reply,
 “ that in the reign of Henry 4, she was
 “ enabled by act of parliament to pur-
 “ chase lands, tenements, &c. with
 “ which reply the defendant’s council
 “ rested satisfied, as if the replication
 “ expressed it sufficiently that she was
 “ naturalized, and thereupon demand-
 “ ed view.”

Altho’ it may appear to some persons
 unquestionable, that by the common
 law of England, he only was a natural
 born subject, who was actually born
 within the ligeance of the king of Eng-
 land, yet have some eminent lawyers
 been of opinion, that this statute of the
 25th of Edward 3d, is merely declara-
 tory of the common law :* and for
 this reason it behoves the author to be
 very explicit in his reasons for sup-
 porting the contrary opinion.

* An opinion of the late Mr. Pigott, written in
 in 1732. And the before mentioned ancient ma-
 nuscript.

It is observed by the author of a discourse concerning treason and bills of attainder,* that until the reign of Henry the 5th, the method of making acts of parliament, was this, “ A bill in the
 “ nature of a petition was delivered
 “ to the commons, and by them sent
 “ up to the lords ; and there it was
 “ immediately entered upon the lord’s
 “ rolls, where the royal assent was entered also : and upon this as upon a
 “ ground work, the judges used at the
 “ end of the parliament to draw up the
 “ substance of the petition and answer,
 “ into the form of a statute, which was
 “ afterwards entered upon the rolls,
 “ called the statute rolls, which were
 “ distinct from those called the lord’s
 “ rolls, or the parliament’s rolls. Upon
 “ on the statute rolls, neither the bill
 “ nor the petition from the commons,
 “ nor answer from the lords, nor royal
 “ assent were entered ; but only the
 “ statute as it was modelled and drawn
 “ up by the judges. From this it is

* Pag. 72, 73.

“ manifest

“ manifest how necessary it is to peruse
 “ the petition upon which a statute is
 “ drawn, in order to understand an
 “ old act of parliament.”

The act of the 25th of Edward 3d, actually refers to the petition which *was put in the parliament in the 17th year of his reign, but was not then wholly assented to*: in fact it was at that time admitted and wholly assented to, that the children of the kings of England, in whatsoever parts they were born, whether in England or elsewhere, were and should be capable of inheriting their ancestors in England: but as to the children of English subjects born abroad, it was found so difficult to make and ordain a proper law upon the subject, that they were then contented to recommend it to the serious consideration of the great men, prelates, commons, and lawyers, how such an act should be framed; as appears by the petition preserved among the records of the tower, and published by Sir Robert Cotton. “ Pour ceo

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“ que

“ que avant les heures grand doubt et
 “ difficultie ont estre entre les grandees
 “ de cest roialme et les commons ausi
 “ bien gentes de le commune et autres,
 “ si les enfans que soient nees in partes,
 “ oustre le mere devient poit heritage
 “ leurs après le decès de leurs ances-
 “ tors in Anglitterre, pur cause que
 “ certain ley na pas estre sur ceo or-
 “ deyne se in arrere oy fuit demaund
 “ per le archevesq: de Canter. a tous
 “ les prelates et gentes present in ce
 “ parlement, si les enfans notre sieur
 “ le roy que foyent nees en partes, &c.
 “ en la ley serioient inheritors en Angli-
 “ terre, lex quex prelates et gentes
 “ chescun per lui examines; deveroit
 “ leurs respons d’une accorde; que il
 “ nad nul manner de doubt que les
 “ enfantes notre sieur le roy quelque
 “ parte que ils soient nees, par deca la
 “ merr ou par de la, poit heretage de
 “ leurs auncestors: mes quant aux
 “ enfantes des auters il est que advise
 “ ales aux dits prelates et grands et auxi
 “ gents

“ gents de ley illonques, presents, que
 “ qui diverse doubts teils acts si de-
 “ bates on impeachments foint misés en
 “ leur heritages ils conviendront molt
 “ apenfor a ut que certain ley sur ceo
 “ soit ordeyne et cest materie autre
 “ foits fut recité in le presens notre
 “ seieur le roy et per eux tous uniment
 “ accord et assenter comme de fouth,
 “ que des enfantes que notre seieur le
 “ roy iluy ad doubte ne difficulte que
 “ ils ne forront inherits de quel parte
 “ que ils soit nees; et en droit des
 “ autres enfans accorde et in cest par-
 “ lement, que ils soit nees en le service
 “ le roy-mes pur ceo que le parlement
 “ et ore de parter, et cest besoigne de-
 “ maund grand avisement et bon deli-
 “ beration, conent el se purra mieux
 “ faire et plus suerment per oustre
 “ tout mainere de impeachment cy,
 “ est accord, que le fesans de le statute
 “ in ce case de remaine, tanque l’au
 “ prochin parlement, issent que oustre
 “ que tems chescun pense com ferra en
 “ ley purra estre ordeyne, et sur ceo
 H 2 “ font

“ font les justices et autres sages charges
 “ per le roy et per les grands *.”

The preamble of this petition specially sets forth, that the difficulties had arisen upon the point *pur cause, que certeyn ley na pas estre sur ceo ordeyne*: a certain proof, that no law then subsisted, which gave the right of inheritance to persons born out of the ligeance of the king: and if any such there was, whence could arise a difficulty in framing a statute merely declaratory of the old law? And in fact, if there had been any doubt at that time actually conceived, whether the children of subjects born out of the ligeance of the king were by the common law capable of inheriting their ancestors in England, it would have been recommended to the prelates, peers and lawyers then present, to ascertain, what the law of the land was in that respect: and not, how they should frame a proper law upon the subject. *Que certeyne ley sur ceo soit ordeyne: et*

* Cot. Ab. 38.

cest besoigne demaund grand avissement & bon deliberation, conent el se purra meux faire, et plus suerment per oustre tout maniere de impeachment, &c.

The next point to be considered is, what was the mischief and defect, for which the common law did not provide. My lord Coke observes, * “that the rehearsal or preamble of a statute is a good mean to find out the meaning of the statute, and as it were a key to open the understanding thereof.” The first thing which the legislature then had in contemplation was, that *great mischiefs and damages had happened* to the people of the realm of England, as well because that the statutes ordained before that time had not been holden and kept as they ought to be, as because of the mortal pestilence that had then lately reigned.

From the first of these considerations, I can deduce no special motive in

* Co. Lit. 79.

the legislature for passing this statute in particular, more than any other beneficial and popular act. * “ It appears from the “ history of those times, that king Edward the 3d. granted above twenty “ parliamentary confirmations of the “ great charter: and these concessions “ were commonly appealed to, as proofs “ of his great indulgence to the people, and his tender regard to their “ liberties. But the contrary presumption is much more natural. If the “ maxims of Edward’s reign had not “ been in general somewhat arbitrary, “ and if the great charter had not been “ frequently violated, the parliament “ could never have applied for those “ frequent confirmations, which could “ add no force to a deed regularly observed, and which could serve to no “ other purpose, than to prevent the “ contrary precedents from turning in-

* Hume Ed. 3. c. 16.

“ to a rule, and acquiring authority.” Such frequent confirmations were then in fact as useless and nugatory, as if an annual act were now to pass for the confirmation of the great charter : the humour of those times, (in which the house of commons seemed first to have acquired any degree of consequence or respect) required repeated and express promises for the observances of all the laws, in which the liberties or advantages of the people were involved. I take these first words of the preamble then, to import no more, than as a popular act was intended to be passed, it should not be violated as others of the like nature had been ; by which means the mischief and damages done to the people by the violation, exceeded the advantages derivable from the observance of them.

The next consideration, which the legislature had in the preamble to this statute, was because of the *pestilence that late reigned*. In the preceding year a destructive pestilence pervaded this
king-

kingdom, after having ravaged almost all Europe, and swept away in some few months about one third part of the inhabitants of this island.* 50000 persons are said to have died of it in the town of Norwich. Now as the welfare, power, and prosperity of a state consist in the number, industry, and abilities of it's subjects; so never could a more seasonable occasion have presented itself for enlarging the benefit of the common law, in favor of those children of English parents, who were or might be born out of the ligeance of the king of England; and who by such their foreign birth, were by the common law excluded from those inheritances, which very probably now (had they been capable of enjoying them) would have devolved upon them, by the destructive effects of this fatal pestilence. *The mischief and defect*

* Stowe's Survey.

therefore,

therefore, *for which the common law did not provide*, was now become more visible and more felt than at any time before, and consisted in this, that the heirs of the blood who otherwise (according to the law of the land) would have a right to inherit their ancestor's lands, were by their foreign birth precluded from that benefit, and rendered useless members, and perhaps enemies to the state. This must have caused jealousies and differences in private families, and a public detriment to the sovereign and the state. And if a person, by residing in a foreign country for the conveniency of commerce, should have acquired a fortune sufficient to purchase an estate of inheritance at home, the very means by which he acquired the fortune, would be the cause why his issue, whom he may have had born abroad, could not succeed to his inheritance : and thus the fruit of many years labour and industry, might by the beggary of his own posterity, only encrease the opu-

lence of a wealthy lord, or of the crown, by the escheat of the land for want of an heir.

The 3d thing to be considered, is, *what remedy the parliament hath resolved and appointed to cure the disease of the common wealth.* The king's children not being subject to the disease, are declared to be out of the necessity of the remedy. At this early period, individuals had not learnt to apply to parliament for private redress or assurances : scarcely indeed had the legislature adopted a systematical mode of enacting public acts. However, being in this instance sensible of the urgency of the evil and the necessity of a remedy, they wisely extended the benefit generally to all future generations ; and in order to carry the remedy back to those, who had contracted the disease, during king Edward the 3d's reign, before the passing of the act, Henry, the son of John de Beaumont, Elizabeth, the daughter of Guy de Bryant, and Giles, son of of Ralph Dawbeney, were naturalized,
and

and a power was vested in his then majesty, to encrease the number indefinitely of such, as should be admitted natural subjects, though born under similar circumstances, by only naming them, *and other which the king will name.* I need but observe once more for all, that here the remedy applied sufficiently denotes the disease : for vain would it have been to naturalize such persons by act of parliament, who were already natural born subjects by the common law. There does not appear in our books one act of parliament, before this, by which any alien was naturalized, or as this statute of Edward 3d, expressed it, made capable of *demanding an inheritance within the ligeance of the king of England.*

Now for the full elucidation of the 4th point, viz. the true *reason and remedy* ; it will be necessary for me to dwell minutely upon each phrase of the following clause : since under this clause the right of being a natural born subject of England, hath been claimed

by all children born abroad of English parents, for about four centuries; and it may still continue it's operation, whatever it be, to several individuals until this present hour.

These words of such momentous import and consequence, are, “ And that
 “ all children inheritors, which from
 “ henceforth shall be born without the
 “ ligeance of the king, whose fathers
 “ and mothers at the time of their
 “ birth, be and shall be at the faith
 “ and ligeance of the king of England,
 “ shall have and enjoy the same benefits
 “ and advantages, to have and bear
 “ the inheritance within the said lige-
 “ ance, as the other inheritors afore-
 “ said in time to come; so always
 “ that the mothers of such children do
 “ pass the sea by the licence and wills
 “ of their husbands.”

By these first words, *all children inheritors*, the legislature did certainly mean no other description of persons than those, who were in it's contemplation

plation at the time of making the law, and consequently liable to the disability, which it meant to remove, and capable of receiving the benefit and advantage, which it meant to grant. Still to adhere to my lord Coke's rule, we will recur to the statute itself in the first place, which in the preamble saith, " That because some people be in " doubt, if the children born in parts " beyond the sea, out of the ligeance " of England, shall be able to demand " an inheritance within the same lige- " ance or not ;" therefore it was submitted to the consideration of the legislature, whether or no such persons so born beyond the sea without the ligeance of England, should be made capable of demanding an inheritance within the same ligeance ; and the result of their deliberation and consideration, was a general naturalization act, by which they were in future enabled to have and to bear an inheritance in England, and consequently to demand

it. For an alien then was and still is, as we have before seen, incapable of bringing a real action for lands of inheritance in England ; and that, because he is essentially precluded from the enjoyment of them ; the law *nihil operatur frustra*, and therefore will not cast a descent upon a person, who is by law disabled to enjoy that, which otherwise might have devolved upon him. The persons therefore intended to be benefited by this act, are indisputably such, who before it passed, were by the old law disabled from demanding an inheritance in England, by reason of their having been born out of the ligeance of the king of England ; but not generally every person who was so disabled, but such only who could *have and enjoy their inheritance after the death of their ancestors* ; which implies that the persons to be benefited by the act, must have had ancestors in England, from whom the estates should descend : and consequently that every person

person, who has any ancestors, from whom he could inherit, if born in England, shall when born out of the king's ligeance, of natural born subjects, claim the benefit of this act. For the obvious purport of the act, was to remove that disability, which such children having ancestors inheritable in England, incurred by their foreign birth : so that when benefited by the act, they should stand precisely in the same condition, as if they had been born in England. If therefore we can settle, in what manner, and how far persons born abroad would have been enabled, before that statute, *to demand their inheritance after the death of their ancestors in England*, if born here, (allowing the utmost latitude to the exception made in the statute) we shall at the same instant determine who is or is not to be benefited under this general and first act of naturalization. It is an universally received maxim, that enabling and beneficial statutes shall be construed equitably and largely, and

disabling

disabling and restrictive statutes, shall be construed literally and strictly.

It is beyond a doubt, that no child born abroad, whose father and mother were aliens at the time of the birth of such child, could claim the benefit of this act; for the 1st condition required by the act, is, that the father and mother shall be at the faith and ligeance of the king of England, which evidently cannot be said of aliens: nor could such a child of alien parents, although born in England, be properly said to be able *to demand his inheritance after the death of his ancestors*: for his father and mother being aliens could have no estate of inheritance in them, nor could he derive a title to any higher ancestor but through the father or mother, and this could not be done at that time either by the common law or by statute; and yet such child of alien parents, born in England, was by the common law of the land, capable of taking an estate by purchase and of transmitting it by descent.

descent to his own posterity: and in fact, his not being able to demand the inheritance of his ancestors does not proceed from any actual disability in himself to inherit, but because he cannot derive his title except thro' his father or mother, neither of whom the law takes notice of in casting a descent: but his blood has in it, the same heritable quality, as if his father and mother had been English: for that quality comes not to us from our parents, but solely from the place of our birth:

* and therefore such child of alien parents born in England, may inherit his brother or any other collateral ancestor, where his title is not derived through either of his alien parents. This difficulty or objection to his claiming thro' his alien parents was removed by an act of king William, † made in the year 1700, which although it produ-

* Godfrey and Dixon Cr. Jac. 539.

† 11 & 12 William 3. c. 36.

ced no alteration in the effects of the 25th of Edw. 3d. yet, by introducing a change in the common law of descents, it becomes so connected with the subject of this investigation, that it will be necessary for me not to pass it over unnoticed. “ Whereas divers persons “ born within the king’s dominions “ are disabled to inherit and make their “ titles by descent from their ancestors, by reason that their fathers and “ mothers or some other ancestor (by “ whom they are to derive their descent) was an alien and not born with “ in the king’s dominions: for remedy whereof it is enacted, that all and “ every person or persons, being the “ king’s natural born subject or subjects within any of the king’s realms “ or dominions, shall and may lawfully “ inherit and be inheritable as heir or “ heirs to any honours, manors, lands, “ tenements or hereditaments, and “ make their pedigrees and titles by “ descent

“descent from any of their ancestors
 “lineal or collateral, although the fa-
 “ther and mother or fathers or mo-
 “thers or other ancestor of such per-
 “son or persons by from through or
 “under whom, he she or they shall or
 “may make or derive their title or pe-
 “digree were or was or is or are or
 “shall be born out of the king’s alle-
 “giance, and out of his majesty’s
 “realms and dominions, as freely fully
 “and effectually to all intents and pur-
 “poses, as if such father or mother or
 “fathers or mothers or other ancestor
 “or ancestors, by from thro’ or under
 “whom, he she or they shall or may
 “make or derive their title or pedi-
 “gree had been naturalized or natural
 “born subject or subjects within the
 “king’s dominions.”

Now as this act of K. William hath
 no express reference to the 25th of
 Edw. 3d, or containeth not a word
 about children born abroad having a
 right to demand an inheritance in Eng-

land, so it can never be taken to have either enlarged or restrained the naturalizing act of Edw. 3d, but leaving that act, as well as the common law to work its own effect, in vesting the general right or capacity to inherit in individuals, it produces that essential alteration in or rather contradiction to the common law of the land, in casting defects, which argues no great depth of consideration or legal knowledge in the framers of the act: and it is a matter most surprising indeed, that a statute so fraught with mischief and so repugnant to the subsisting rules of the common law, should have remained for the greatest part of an enlightened century unaltered and unrepealed. And hereto may be justly applied the remark of the late judge Blackstone *. “That it
 “hath been an ancient observation in
 “the laws of England, that whenever
 “a standing rule of law, of which the

* Bl. Com.

“reason

“ reason perhaps could not be remem-
 “ bered or discerned, hath been wan-
 “ tonly broken in upon by statutes or
 “ new resolutions, the wisdom of the
 “ rule hath in the end appeared from
 “ the inconveniences, that have fol-
 “ lowed the innovation.”

It is clear from the express words
 of the preamble to king William’s sta-
 tute, that by the common law, a per-
 son, though *born within the king’s domi-
 nions, was disallowed to inherit and make
 his title by descent from his ancestor, if
 his father or mother, or other ancestor,
 by whom he was to derive his descent was
 an alien*: and the rule of law is still
 the same that it ever was, that an alien
 is not noticed by the law, in transmit-
 ting a descent, according to the opinion
 of the court, in the famous case of the
 earl of Holderness, under the name of
 Collingwood and Pace, in which the
 lord chief baron Hale concurred in opi-
 nion with 7 of the judges, against 3 in
 the exchequer chamber, in a very long
 and learned argument: to which we
 shall

shall frequently have future occasion to refer.* “ If the eldest son be an alien, “ the law takes no notice of him ; and “ therefore as he shall not take by descent, so he shall not impede the descent to his younger brother.” And again,† speaking of the natural born sons of alien fathers, he says, “ for as “ they are disabled to make resort to “ their fathers, (*that is to derive their “ their title either from or thro’ their “ fathers*) yet do they receive such “ a quality from their fathers, as “ entitles them to be esteemed sons, “ and therefore may be heirs to the “ mothers, as was agreed.” Now although this act of king William gave a right to the son of an alien father to have resort to his father, if he chose to make out his claim, still the operation of the common law remained the same ; and in the case above stated, upon the death of the father, the law (notwith-

* Vent.

† Sid. 200.

standing the existence of the eldest son) did in reality take no notice of him, but actually cast a descent upon the younger : although the estate so cast upon the younger son by the common law, was certainly defeasible by the eldest son, by force of this statute of king William. To shew the unlimited extent of the mischief, with which this statute was fraught, we need only recur to the above stated case of a father and two sons, the elder alien, the younger a natural born subject :

If the elder brother, at the distance of 30 years, marries and dies, and his wife is delivered of a child in England, after the law had cast the descent of the estate upon the younger brother, by the death of the father, then by the force of the statute of king William, the child of the elder brother may derive and make good his title to the lands of his grandfather, through his father, though an alien, and so defeat the estate of his uncle, which the law cast upon him, even before the
birth

birth of the claimant. However during the space of 52 years, these mischiefs were either not seen or not remedied : until by an act of his late majesty,* the chief part of the inconveniency was removed.

The act recites, that, “ Whereas
 “ many doubts and inconveniencies may
 “ arise upon the said recited act (of
 “ king William,) in case of persons
 “ gaining capacities to inherit and de-
 “ rive their pedigrees by virtue of the
 “ said recited act, after the death of their
 “ ancestors, to whom they claim to be
 “ heirs, whereby estates well vested by
 “ descent, mortgages, purchases, and
 “ settlements, duly made, may be de-
 “ feated ; for remedy whereof, &c. It
 “ is enacted, that the said statute of
 “ William 3d, shall not extend or be
 “ deemed, taken, or construed to ex-
 “ tend to give any right or title to any
 “ person or persons, to inherit as heir,
 “ or heirs, or coheir or coheirs, to any

* 25 G. 2. c. 39.

“ person

this capacity shall arise ; it became therefore necessary to restrain this general and unconfined meaning, lest the statute should be pleaded generally by any legitimate child of any country, who was capable of inheriting his ancestor's landed property : the statute therefore confines the benefit to such children only, whose fathers and mothers were at the faith and ligeance of the king of England, at the time of their birth : thus readmitting to the participation of our laws and constitution, these persons, who had only, as it were, accidentally lost the benefit and protection thereof, by their foreign birth ; although by every tie of consanguinity and society, they must be supposed to possess an affection and regard for their country and government : so that thus naturalized, they might become in fact and law, as well as in heart and spirit, true native subjects.

Thus it is clear from the different parts of the same statute, that the child
of

of alien parents born out of the ligeance of the king of England, cannot be included in the words *children inheritors*, who are intended to be benefited by the statute. In short, the plain modern English of those words of the 25th of Edward 3d, seems to be neither more or less than the *legitimate children of all british subjects*: it is evident, that the legislature had the circumstance of their legitimacy in contemplation, by specially providing how the contrary should be proved, if alledged against them: and it is conclusive from what has been heretofore proved, that no person out of the ligeance or dominion of the king, can owe him faith or ligeance, besides his own subjects, who are therefore called his liege subjects or liegemen; and that such liege subjects, in whatsoever parts they may be, or whatsoever engagements they may have assumed to foreign powers, must necessarily remain at the faith and ligeance of the king; for every man by his birth in this country, becomes a liege

subject to our king, nor shall he by any act of his own cease to be such a subject, while he has life.

A bastard, says Littleton,* “ Is “ *quasi nullius filius*, because he cannot “ be heir to any ;” therefore such can never be called *children inheritors*, even if born in England, for they cannot by possibility have any ancestor lineal or collateral : and indeed the act makes a special provision how the bastardy of children born abroad shall be proved. And yet may a bastard born in England, take lands by purchase, and be inherited by and through the children of his own body.

Had the 4th of Geo. the 2d. never passed, it would have here been natural to conclude generally, that every child whose father and mother were not aliens, or who continued to owe the debt of allegiance to our king even

* Lit. Sect. 188.

whilst residing within the ligeance of some foreign state, might, if born within such last mentioned ligeance, claim the right of being a natural born subject of England under the 25th of Edw. 3d, and the 7th and 10th of queen Ann. As the 4th of G. 2, has attempted to place the children born abroad of persons attainted, or liable to be attainted, or serving a foreign enemy, on the same footing with the children of aliens and with bastards, the force and operation of that statute shall be the subject of our future enquiry; and for the present we will suppose that it never has been made: in fact, it expressly says that all such children shall be and remain in the same state, plight and condition to all intents, constructions and purposes whatsoever, as they would have been in, if the said acts of the 7th of Ann and the 4th of Geo. the 2d had never been made. We must therefore in deference to this statute of the 4th of Geo. 2d, examine whether the words

children

children inheritors in any shape exclude the children of such parents, who are described in the 4th of Geo. 2d, viz: the children of fathers, 1st. attainted of high treason, 2dly. liable to the penalties of high treason or felony for returning into this kingdom or Ireland without licence, and 3dly, engaged in the service of a foreign power at enmity with the crown of Great Britain.

It hath been said that the law takes no notice of an alien * either in the transmission or derivation of a title by descent; † *but it is, as if such person had gone out of the way*, and hence arises “ § the disability that reflects from “ an alien to one, that must derive by “ or through him, though he per. “ chance be a natural born subject.” Such a child then, being at the time of

* 1 Vent. 417. † Cro. Jac. 539 and 22 H 6.
Doct and Stud. § Vent.

making

making the statute of Edward the 3d. and for several centuries afterwards, disabled by the common law to demand an inheritance within the ligeance of the crown of England, could not evidently come under the consideration of the Legislature. But there is a difference made by our law, between the children of attainted parents and the children of alien parents: although to some effects they are similarly situated. * “The law looks upon
 “a person attaint, as one that it takes
 “notice of, and therefore the eldest
 “son attaint, overliving his father,
 “though he shall not take by descent
 “in respect to his disability, yet he
 “shall hinder the descent of the younger son. But if the eldest son be an
 “alien, the law takes no notice of
 “him, and therefore as he shall not
 “take by descent, so he shall not impede the descent to his younger
 “brother.”

* 1 Vent: 417.

My lord chief baron Hale in his argument upon the aforeſaid caſe of the earl of Holderneſs throws the whole matter into the cleareſt light. “ The
 “ diviſion of deſcents is of two kinds:
 “ 1ſt. lineal as from the father or
 “ grandfather, to the ſon or grandſon;
 “ ſecondly collateral or tranſverſal as
 “ from brother to brother, uncle to ne-
 “ phew or *e converſo*: and both theſe
 “ again are of two ſorts: 1ſt. immedi-
 “ ate, as in lineals from father to ſon:
 “ 2dly. mediate, as in lineals from
 “ grandfather to grandſon, the father
 “ dying in the life of the grandfather;
 “ when the father is the *medium deſe-*
 “ *rens* of the deſcent: 3dly. in colla-
 “ terals, from the uncle to the nephew,
 “ or from the nephew to the uncle,
 “ where the father is likewise the *me-*
 “ *dium deſcens*.”

It was before ſaid, that the children of alien parents could not be termed *inheritors*, becauſe they could not derive their title through an alien anceſtor: but this is to be underſtood only
 of

of lineal descents mediate and immediate; not of collateral or transversal descents: for in the case of the earl Holderness, it was determined * that if an alien had two sons born in England, and the one purchase lands and die without issue, the survivor shall inherit the other; and the main ground of the judgment was, that the descent between the two brothers was an immediate descent. And it is there also holden " That the attainder of a lineal ancestor shall not hinder collateral descents, as the attainder of the father shall not hinder the descent among brothers, and for this cause, because the father is not the *medium*, through which the descent between the brothers is derived, or rather, the father is *medium deferens sanguinem*, and the brother is *medium deferens hæreditatem*."

" † Whenever the courts of law have undertaken to decide any ques-

* Sid: 198. 200. † Vent: ubi supra.

“ tion concerning the incapacity of an
 “ alien, or of the consequential results
 “ that arise from it, the law hath al-
 “ ways been very gentle in the con-
 “ struction of a disability, and rather
 “ contracting it, than extending it so
 “ severely. And in Calvin’s case, the
 “ report is grounded upon this gen-
 “ tle interpretation of the law, though
 “ there were very witty reasons alledg-
 “ ed to the contrary.” If therefore
 we are to follow the example set us
 by the courts of law, it will follow
 that all such persons, who by the com-
 mon law would have been capable of
 inheriting lands in England, if born
 within the ligeance of the crown of
 England, by collateral descents, shall be
 included and comprized under the
 words *children inheritors*, (unless
 restrained by the subsequent condition
 of their father and mother being at
 the faith and ligeance of the king of
 England, and their mother having pas-
 sed the sea with the licence of her
 husband,) and consequently intitled to
 the

the full benefit of the general naturalization act of Edward 3d, in case they shall be born without the ligeance of the crown of England: for the capacity of inheriting collaterally, is one and the same as the capacity of inheriting lineally, and arises solely from the legitimacy of blood and the place of birth: in the case of a child of an attainted father and mother, what obstructs the lineal descent, is not any disability or incapacity in the child to inherit, but the corruption of the blood of each parent, which operates in them an impossibility to have an heir. To adopt any other idea of this matter, would be as absurd, as to say, that the inability of a grantor to make a grant, created an absolute disability in the grantee to take one.

It must be observed, that we have hitherto only treated of such children, whose fathers and mothers were both attainted. Such cases have seldom happened; though they may happen: - but the cases have been very frequent,

“ by act of parliament, and restitutions
 “ by parliament are of two kinds, one
 “ a restitution only in blood, which
 “ only removes the corruption thereof,
 “ but restores not to the party attaint
 “ or his heirs, the manors or honours
 “ lost by the attainder, unless it spe-
 “ cially extend to it: the other is a
 “ general restitution not only in blood,
 “ but to the lands &c of the party at-
 “ taint.”

It is certain, that the doctrine of the
 relative effects of an attainder, has un-
 accountably retained a degree of ap-
 parent inconsistency and confusion.
 For although the rules, principles and
 maxims of our law concerning them,
 are in themselves clear and consistent,
 and the determinations of the courts
 of law are pointedly decisive in con-
 firming and establishing them; yet my
 lord Coke * in his comment upon Lit-
 tleton, and after him most of the mo-
 dern writers upon our laws, in deli-

* Co. Lit. 392.

vering their own opinions, seem to have taken it for a settled point, that the effects of an attainder were to corrupt the blood, not only of the attainted person himself, *but of all above him and about him and of his children born at the time of his attainder.* “ But *
 “ by the pardon he was as a new creature, *tanquam filius terræ*, whose
 “ blood upwards remains corrupted :
 “ but for the issue had after the pardon
 “ he is inheritable to his father ; and if
 “ his father had issue before the pardon, and had issue also after and
 “ dieth, nothing can descend to the
 “ youngest, for that the eldest is living
 “ and disabled. But if the eldest son
 “ had died in the life of the father
 “ without issue, then the youngest
 “ should inherit.” Such is the doctrine laid down by my lord Coke and adopted by most subsequent writers : it becomes essentially necessary for our purpose to examine how far it be ef-

* Co. Lit. 391.

tablished or defeated by the determinations of the courts on the most solemn occasions.

It is admitted by my lord Coke, as well as by all other writers upon our laws, that the person, whose blood is corrupted, can neither have an heir or be an heir : but if the *blood of those above the attainted person, about him and of his children* be corrupted by the attainer, then can none of them either have an heir or be an heir : but the contrary hath already appeared, and will more fully appear hereafter, viz. that the father, brother, uncle, and son of an attainted person, are to all intents and purposes, capable of being heirs, and having heirs, lineally and collaterally, and that indefinitely as to all persons whomsoever, except where it becomes necessary for them to resort to the blood of the attainted person, in order to derive their title to the inheritance. By the attainer of a father, his most remote possible heir is as much affected as his eldest son : they are
both

both for ever barred from taking an estate of inheritance, from or through him ; but remain equally capable of taking an estate by descent, from and through all other persons indefinitely.

Every person, says Siderfin,* in reporting my lord chief baron Hale's argument, in the famous case of the Earl of Holderness, has the like natural blood, which he receives from Adam ; but it is the municipal law, which gives the heritable capacity : so that in England, it is the place of the birth joined with the natural blood, that gives the enabling quality to inherit : yet this natural blood must proceed from such kindred as our law takes notice of : so a person born before marriage, hath not in him such blood, as our law takes notice of, and therefore can he inherit to no person : a bastard then must be the first of his family ; for he cannot by possibility derive his title higher ; for he can have no ancestor lineal or

* Sid. 200.

collateral.

collateral. “ But it is not so in the
 “ case of the son of an alien, or of a
 “ person attainted; for as they are dis-
 “ abled to make resort to their fathers,
 “ yet do they receive such a quality
 “ from their fathers, as intitles
 “ them to be esteemed sons, and there-
 “ fore may be heirs to their mothers, as
 “ was agreed. And so lord Coke in
 “ saying, that the *sanguis duplicatus* was
 “ absolutely requisite in every heir,
 “ confutes himself, as appears by this
 “ last case.”

As the father then before the attain-
 der did not give the heritable capacity
 to the blood of the son, but the place
 of his birth, so does he not by his at-
 tainder communicate unto, or create
 any disabling quality in the blood of his
 son.* The case put by my lord chief
 baron Hale, and agreed to by the
 court is pointedly decisive. “ The
 “ grandfather and grandmother, both
 “ aliens, or attainted of treason, have

* Vent. ubi supra.

“ issue, the father a Denizen, who hath
 “ issue, the son a Denizen, the son shall
 “ be heir to the father, notwithstanding
 “ standing the disability of the grand-
 “ father : for they are not *medii ante-*
 “ *cessores* between the father and the
 “ son, but paramount ; and yet all the
 “ blood the father hath, he derived
 “ from his disabled parents.”

And again, “ If the father be at-
 “ tainted, the blood of the grand-
 “ father is not corrupted, no nor the
 “ blood of his son, though he could
 “ not inherit him, but only the blood
 “ of the father : but that corruption of
 “ blood in the father draws a con-
 “ sequential impediment upon the son
 “ to inherit the grandfather, because
 “ the father’s corruption of blood ob-
 “ structs the transmission of the heredi-
 “ tary descent between the grandfather
 “ and the son. And here we must take
 “ notice of a great diversity between a
 “ disability in the blood and a bar.”

‘This will assuredly suffice to prove
 beyond any doubt, that the child of

an attainted father, is by the law of this country capable of inheriting either lineally or collaterally, wherever he is not obliged to derive his title through his attainted father. For if such son, by being a legitimate child, and born in England, is capable of inheriting generally, wherever there is no particular bar: it follows that he shall certainly inherit the lands of his mother, unless the attainder of the husband should cause a bar, or as lord Coke said before, unless by *the attainder all the blood is corrupted, above him, about him, &c.* And if this doctrine should be admitted, then must it again be said, that my lord Coke confuteth himself, by reporting the following case: *

“ William Ocle, and Joan his wife,
 “ purchased lands to them two and
 “ their heirs: after William Ocle was
 “ attainted of high treason for the murder of the king’s father, Edward 2d,
 “ and was executed. Joan his wife

* Co. Lit. 187.

“survived him. Edward the 3d,
 “granted the lands to Stephen de Bit-
 “terley and his heirs. John Hawkins
 “the heir of the said Joan, in a petition
 “to the king, discloseth this whole mat-
 “ter, and upon a *scire facias* against the
 “patentee, hath judgment to recover
 “the lands.” Now if, as we have
 proved before from lord chief baron
 Hale’s argument, the child of an attainted
 father, receives or incurs no disability
 in himself by the attainder of his
 father, *but may inherit his mother*; if
 Joan had left a son by William Ocle,
 he would have stood as heir at law to
 Joan, in the same situation as John
 Hawkins, who was a remoter heir,
 and been equally entitled to the lands
 of his mother: nor in order to recover
 them, would it have been more neces-
 sary for him than for a remoter heir, to
 derive his title through his father.

From what hath been said, it is
 conclusively evident, that the child of
 an attainted father born in England, is
 to all intents and purposes in himself,
 capable

capable of inheriting lands in this country, and therefore comprized under the words, *children inheritors*, in the statute of Edward the 3d ; consequently, if his father and mother were at the faith and ligeance of the king of England, at the time of his birth, altho' he were born out of the ligeance of the king of England, yet is he by the 25th of Edward the 3d, made capable of *bearing the inheritance after the death of his ancestors in England*, as well as those, who were born within the ligeance of the crown of England.

The next requisite to entitle a child born out of the ligeance of the king of England, to the benefit of king Edward's act of naturalization, is, *that his father and mother, at the time of his birth be and shall be at the faith and ligeance of the king of England*. Now it hath been proved heretofore, that every person, who had contracted by birth, this debt of allegiance to his sovereign, could never be released from it, but by the express consent of the sovereign,
or

or of the legislature, which has never been known to be done in any one instance whatsoever. It follows consequently, that the benefit of this law of Edward the 3d, is evidently extended to the children born abroad of all parents indiscriminately, who were by birth or otherwise, at the faith and ligeance of the king of England, or in other words were his liege subjects.

And this condition, which is in the nature of an exception, from the express words, as well as from the spirit of the act, can only be construed to extend to illegitimate children born out of the ligeance of the crown of England, and the legitimate children also born out of such ligeance, whose parents were not the liege subjects of the crown of England: and upon these grounds did lord chief justice Hufley say, *that this statute treateth of liege subjects*: consequently this exception could only go to exclude such children from the benefit of the act, whose parents were not liege subjects of the crown of England.

Such

Such then was the policy of those days, (which the legislature never found expedient to alter for near four centuries) not to admit a mixture of foreign blood into this kingdom, even under the necessity of replacing one third part of it's inhabitants, who had died the preceding year of the plague : thus not only excluding the children of foreigners, but also the children of many persons of English extraction, who had been born under the ligeance of some foreign power. For if it were expedient to prevent the introduction of foreign manners, customs, habits, or connections, by naturalizing the children of foreigners, the same reasons must have carried their weight proportionably against the children of those English families, which had resided for above one generation in foreign parts.

It will not be too great a presumption to assert, that our ancestors were generally not only more sparing of their words in enacting laws, than their posterity ; but also more attentive to their
real

real import and meaning. There is no room for a doubt, but that, if the legislature had intended to exclude the the children of attainted persons born abroad, from the benefit of that naturalizing act, they would have expressly excepted those children, whose fathers and mothers at the time of their birth, had forfeited or were not entitled to the benefit of the protection of the king of England: it is warrantable to say, that the parliament sitting in the 25th year of the reign of king Edward the 3d, were clearly and fully aware of the distinction between persons *at the ligeance and persons intitled to the protection of the king* ; for in another act, * passed in that same year, it is said, that persons attainted in a premunire, shall be out of the protection of the king, *hors de la protection notre siegnur le roy :*

* 25 Edward 3. st. 5. c. 22.

but

but it says not, that they shall not be at the faith and ligeance of the king ; for a liege subject may certainly forfeit his right to the protection of the king, but he cannot by his own crime destroy the right of sovereignty, which the king hath over him as a liege subject.

This act of Edward the 3d, was the first act of naturalization made by parliament ; and the proof that it was not passed slightly or without consideration is, that for near three hundred and threescore years, during the greatest variety of changes and revolutions in the manners, policy, wealth, power, extent of dominion, alliances, religion, and government of this country, the legislature never found it necessary to enlarge, restrain, explain, alter, or repeal it.

The sole difference between a general and a private naturalization act, is, that the former applies it's effects to all persons indiscriminately, who shall be

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found

found under the circumstances required by the act, to intitle them to the benefit thereof: and the latter undertakes to examine into the qualifications and circumstances of the individuals, to whom it applies it's effects. What my Lord chief Baron Hale* in the said case of the Earl of Holdernes said, is applicable both to a general and private act of naturalization: "Naturalization, according to our law, can only be by parliament, and not otherwise: and it doth doubtless remove that inability and incapacity, that is in aliens, in respect of themselves, and so put them in the condition, as if they had been born in England." Now the sole inability or incapacity to inherit, that can exist in any person, must arise from one of these three causes, viz. from a want of legitimate blood, from the place of birth, or from attainder, outlawry, &c. The act of Edward the 3d, undertakes to remove the inca-

* 1 Vent. 419. 420.

capacity arising from a foreign birth ; and if after the removal of that impediment by act of parliament, the child could have enjoyed the inheritance of his ancestors in England, then will he, if born out of the ligeance of the crown of England, be undefeasibly intitled to the benefit of the 25th of Edward 3d.

In what then does this benefit consist ? In this : that from the passing of the act of the 25th of Edward the 3d, all children born under the circumstances aforesaid, out of the ligeance of the king of England, “ *shall have and enjoy the same benefit and advantages, to have and to bear the inheritance within the same ligeance, as the other inheritors aforesaid in time to come :*” in other words, such children shall be to all intents and purposes, natural born subjects of England. But it seems to qualify the capacity by the relative words, *as the other inheritors aforesaid ;* which words must evidently be referred to Henry de Beaumont, Elizabeth de Bryan, and Giles Dawbeny, who were born

beyond the sea out of the ligeance of the crown of England, and are qualified by this act of naturalization (for to them it was as a particular and private act, though general and public to all future generations) to have and enjoy their inheritance after the death of their ancestors, in all parts within the ligeance of England, as well as those, which should be born within the same ligeance.

There is still one other qualification made requisite by the statute, to intitle a child born abroad to the benefit thereof: and this is, that the mother do pass the sea by the licence and will of her husband.

It appears wholly unaccountable that a court of law should have extended the penal effects of the 5th of Richard the second, so as to make the children born out of the ligeance of the crown of England to be aliens, whose parents went abroad without the licence, which was required by that act: when the act particularly limits the penalty
to

to the forfeiture of the personal estate: the reporter of the following case gives no reason or ground for the opinion of the court: although he particularly states it to have been given against the opinion of Hufsey.

* In the case of Hyde and Hill "It was held upon evidence, that if baron and feme English go beyond the sea without licence, or tarry there after the time limited by the licence, and have issue, that the issue is an alien and not inheritable, contrary to the opinion of Hufsey 1 Ric. 3. 4." This case was adjudged in the 24th year of queen Elizabeth's reign, at the time when licences to go out of the kingdom were necessary, that is, between the 5th year of Richard 2d. and the 4th of James the 1st.

There having been no reason or ground given of this judgment, it becomes extremely difficult at this dif-

fance of time and when the leading circumstance, viz. the necessity of a licence, hath ceased to exist, to alledge the real motives and reasons of the court for such a determination. If the author may be permitted to hazard his idea upon the subject; the court must have held, if the report be true, that the condition of the wife's passing the sea with the will and licence of her husband, was incompatible with the want of the king's licence for either of them to leave the kingdom; and thus was the 5th of Richard 2d made to controul that condition of the 25th of Edward 3d: but as the 5th of Richard 2d, hath been long since repealed, the determination of this case cannot in any manner affect those children born abroad, whose parents did not require a licence to quit the kingdom.

It has been before remarked, that the constructions of this statute had always been very favourable, rather
 . extending

extending than restraining the benefit thereof. Thus for example, it seems at first view natural to understand, by the words of the statute, *fathers and mothers &c.* that it is requisite that both father and mother should be at the king's ligeance, or in other words, his majesty's liege subjects: and that the legislature particularly seemed to consider the mother as such, by annexing the condition of her child's capacity to inherit, to her husband's consent and licence to quit the realm: and yet it hath been[†] adjudged, that the child of an English man and a Polish woman born out of the ligeance of the king shall be able to inherit lands in England *: the reporter of that case has these remarkable words “ *Plusors des* judges teigne que les parols in 25th Edward 3d. *de natis ultra mare,* “ whose *fathers and mothers* be or “ shall be at the faith and ligeance of

* Lit. Rep. 23.

“ the

“ the king, sera prise distributive non
 “ copulative, *fathers or mothers.*” This
 case of the king and Eaton was ad-
 judged in the 2d. year of king Charles
 the 1st; and another almost similar
 case of Bacon and Bacon † was ad-
 judged in the 16th year of king Char-
 les the 1st.

But the learned argument of Lord
 Chief Baron Hale in the case of
 the Earl of Holderness, which was de-
 termined in the 16th year of the
 reign of king Charles the 2d. has
 thrown so much light upon the ques-
 tion, that the principle, upon which
 the reporters of both the cases of
 the king and Eaton, and Bacon
 and Bacon, found the judgment of the
 court, is entirely over ruled and done
 away by this subsequent determination.
 It is indeed said in both those cases,
 that if the mother had been English
 and the father foreign, then would

† Cro. Car.

not the issue have been a natural born subject: but as this was not the matter before the court, and is only a dictum grounded upon an erroneous principle, it can retain no degree of authority whatever: It is evident, that in order to give any degree of effect in this case, to the principle, *partus sequitur patrem*, it must be admitted, that the father communicates the heritable quality to the blood of his child: now the contrary has been manifestly proved, that the child derives no other quality of blood from his parents, than that of legitimacy, which is the first necessary required by our law, to make his blood heritable: and this heritable capacity he derives solely from the place of his birth: this is clear from the case of a child born in England, either of two alien or attainted parents: the blood of the child is in itself inheritable actively and passively, and yet none of the parents had any heritable blood in

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them

them to give. The only case, to which this principle ever ought to have been applied in our law, is, where the child derives his nature or condition from his father, as in the old feudal tenures he did that, * either of a freeman or a villain. * The principle then, that *partus sequitur patrem* can only hold in those things, which the issue derives from the father; but he does not derive the heritable capacity of his blood from the father, therefore the principle is not applicable to the case of a child's claiming a right to inherit, because his father had that right in him.

I can find no case in the books, in which it hath been adjudged, that the wife being English and the husband an alien, their issue born abroad shall inherit: or indeed, where the

* It is surprizing how the late judge Blackiston and many other writers should have adapted this principle to the case of aliens and Denizens, and to the children of attainted parents.

contrary

contrary hath been exprefsly determined: for the dicta, which are frequent in the reporters, that fuch would be the cafe, being evidently grounded in the aforefaid maxim, that *partus fequitur patrem*, are totally impertinent to the point in queftion. Nor will it be lefs difficult to fhew the force of the other reafon, *quia femina eft fub poteftate viri*, which is alledged by the reporters, why the benefit of the 25th of Edward 3d, fhould not extend to the iffue of an Englifh mother, as well as to the iffue of an Englifh father: for by blood, one is as much Englifh as the other: and the king having equal right and intereft in the allegiance of them both, as alfo to that of both their children, if born in England, may prevent the one as much as the other from going out of the kingdom: and it is equally neceffary that the children of an Englifh mother, as thofe of an Englifh father fhould have anceftors within the lige-
ance

ance of the crown of England, whose inheritances they might bear after their decease; and such, it appears, were the persons, intended to be benefited by the 25th of Edward the 3d.

It may seem needless to consider, how the child of an English mother and alien father born abroad would be benefited under the 25th of Edward 3d, as the matter is made clear by the 4th of George the 2d, that at present, every child born abroad, whose *father* was a natural born subject of Great Britain, shall be a natural born subject to all intents and purposes whatsoever: but as the 4th of George the 2d. has attempted to place several descriptions of persons out of the effects of the 7th and 10th of queen Ann and the 4th of George the 2d, it is in consideration of such persons, that we take the matter under our thoughts; for they are to be, according to this last act of George the 2d, in the same state plight and condition, in which they would have

have been, in case these later acts had never been made, and therefore in the state of making their claims under the 25th of Edward 3d.

As the case then hath not as yet received a judicial determination, it is to be presumed that the courts would certainly be guided in the construction of that act, by the spirit of lenity which produced the decisions already mentioned, and give every weight they could to the opinion and doctrine of Lord chief Baron Hale, laid down in his argument of the case of the Earl of Holdernefs. The only instance, in which I can find, that this case came before the court and received any sort of determination, was in this very case: and as much of it, as relates to the point in question, is as follows.

Robert Ramfey a Scotch alien, had in the time of Elizabeth four sons, also aliens born.

1st, Robert, who had issue three daughters.

2d,

2d, Nicholas, who had issue two sons, Patrick and William.

3d, Sir John who had no issue.

4th, Sir George who had issue John.

Before Sir George the 4th son had any issue, he was naturalized by a private act of parliament: as was also the 3d son Sir John (afterwards created Earl of Holderness :) and it being the question, whether John the son of Sir George should inherit the lands of his uncle John Earl of Holderness, my Lord chief Baron Hale, thus expresses himself upon the subject; which, though not immediately before the court for its decision, yet came to be involved in the general question.

* “ Before I come to the argument
“ of the question, the verdict had
“ need be delivered of a question,
“ which possibly would make an end
“ of the dispute.”

“ It hath been said, that if the
“ wife of Robert were an English wo-

* Vent: ubi. supra.

“ man,

“ man, there would be no question, but
 “ the land might descend between the
 “ brothers John and George, though
 “ Robert the father were an alien;
 “ and that it shall be so intended, because
 “ nothing appears to the contrary.

“ To this I say,

“ It is true, that if the mother were
 “ an English woman, the descent from
 “ John to George his son would be un-
 “ questionable, for notwithstanding the
 “ incapacity of Robert the father, by
 “ being an alien, they might inherit
 “ their mother, and consequently they
 “ might inherit one the other.”

This appears to be very decisive of
 the point in question with us, viz. that
 the child born out of the ligeance of
 the crown of England, of an English
 woman, should inherit his mother, tho’
 his father were an alien : for such was
 the case then in the consideration of the
 court: but as the reporter Ventris,
 makes the Lord chief Baron continue his
 argument, it carries with it such an
 inexplicable degree of inconsistency, as

to this point, as obliges us to conclude, that the dictum put in the mouth of the chief Baron, was an inaccuracy in the note taken of the case, or an inference made by the editor of the report : and indeed considering the method, in which notes are taken in the courts, and reports are afterwards published from them, it is no wonder, that errors, inconsistencies, and inadvertencies so frequently occur in the reports of cases and arguments ; and it is certainly justifiable, when the opinion of the court is clear, as to the matter before them, and dubious and contradictory, in a dictum upon the case, to attribute such obscurity or contradiction to the reporter, and adhere to the words, doctrine, and opinion of the court upon the matter before them, in which there is no ambiguity, obscurity, or repugnancy. Upon this principle then, must be rejected the latter part of the following paragraph, as a dictum absolutely contradictory to the before recited words of the chief Baron's argument.

“ It

* “ It hath been endeavoured to be
 “ answered, that it is not possible that
 “ the mother could be an English wo-
 “ man, because the sons are found
 “ to be aliens. But that will not be
 “ so ; although an Englishman marry
 “ an alien beyond the seas, and having
 “ issue there, the issue will be Deni-
 “ zens, as hath been often resolved ;
 “ yet it is without question, *that if an*
 “ *English woman go beyond the seas, and*
 “ *marry an alien, and have issue born be-*
 “ *yond the seas, the issue are aliens : for*
 “ *the wife was sub potestate viri, and yet*
 “ *the issue born in England should inherit,*
 “ *though the husband be an alien.*”

“ But the true answer is, that in this
 “ case, Robert the husband being an
 “ alien, born out of the ligeance of the
 “ crown of England, and marrying,
 “ and having all his issue born there,
 “ she shall not be presumed an English
 “ woman, but shall be presumed a na-
 “ tive of Scotland, where her husband

* Vent. ubi supra.

‘ lived and had issue, unless the contrary had been expressly found.’

Now if my Lord chief Baron had been of opinion, that without question, Mrs. Ramsey being an English woman, and having married an alien, and having issue born without the ligeance of the king of England, such issue were aliens ; it would be the extremity of absurdity and contradiction, for him to say, *that finding the mother to have been an English woman, would have possibly made an end of the dispute ; and that it is true, if the mother were an English woman, the descent from John to George, his son would be unquestionable ; for notwithstanding the incapacity of Robert the father, by being an alien, they might inherit their mother ; and again, that she shall be presumed an alien, unless the contrary had been expressly found.* Now the doctrine so clearly and pointedly delivered in the rest of the case, that the place of birth alone could give a right to inherit, and the congruity of the whole of the argument, (except that
one

one dictum or supposition) fully evince the opinion of the Lord chief Baron on the matter. For if at all events her issue born in Scotland, were aliens, because their father was an alien, how could the finding the mother to be an English woman, put an end to the dispute, which was upon the capacity of the natural born children of aliens, inheriting to each father collaterally. Therefore unless there has been some later case determined, in which this point has been expressly decided to the contrary, it must be admitted to be law, that before and independantly of the 7th and 10th of queen Ann, and the 4th of Geo. the 2d, the child of an English woman and an alien father, born abroad or out of the ligeance of the king of England, was and is, (to use the chief Baron's words) *capable of inheriting his mother*, and consequently a natural born subject of England to all intents, constructions, and purposes whatsoever: and this by force of the 25th of Edward 3d, which

removed the disability, which was incurred by the foreign birth of the child, and made him capable of demanding his inheritance after the death of his ancestors in England. Thus far have we traced the effects of the 25th of Edward the 3d, and we have been the more particularly minute in the search, because the 4th of George the 2d, has endeavoured to place several descriptions of persons out of the reach of the 7th and 10th of queen Ann, and the 4th of George the 2d : it will be the remaining task to examine and disclose the force, operation, and effects of these three later statutes.

The first and general intent of the 7th of queen Ann, was to encrease the population of the country, and advance the profession of the protestant religion, as appears by the preamble of the act :
 “ Whereas the encrease of people is a
 “ means of advancing the wealth and
 “ strength of a nation ; and whereas
 “ many strangers of the protestant or
 “ re-

“ reformed religion, out of a due con-
 “ sideration of the happy constitution of
 “ the government of this realm, would
 “ be induced to transport themselves
 “ and their estates into this kingdom, if
 “ they might be made partakers of the
 “ advantages and privileges, which the
 “ natural born subjects do enjoy, &c.”

And therefore it naturalizes every fo-
 reigner of every denomination and de-
 scription whatsoever, who shall subscribe
 to the oaths, read the declaration, and
 receive the sacrament of the lord's sup-
 per in the church of England : and in
 this act, is inserted the before menti-
 oned clause, which enlarges in some
 manner the 25th of Edward the 3d.
 The repeal of this statute, as to it's na-
 turalizing foreign protestants within 3
 years, viz. by the 10th of Ann, verifies
 the observation of Judge Blackstone,
 upon every attempt to alter the old
 law : I call it the old law, because, al-
 though in itself it was a statute enlarg-
 ing the common law, yet having stood
 the

the test of so many centuries, and those fraught with such a diversity of revolutions, it justly deserves the appellation. But then, the clause for naturalizing the children of natural born subjects, born out of the ligeance of the crown of England, still retains it's force, as to the nation at large. The words of the 7th of Ann, *the children of all natural born subjects*, are general words, without any condition, exception, or restriction, and extend much more largely than the words of Edward the 3d, children inheritors, whose fathers and mothers be and shall be at the faith and ligeance of the king, at the time of the birth of the child, and whose mother must have the licence of her husband to pass the sea. It will be needless for me to point out, what particular inconveniencies were felt by the legislature, from this general naturalizing clause of the 7th and 10th of queen Ann: it is plain they found it too general, and therefore undertook to explain it by
the

the 4th of king George the second.* From Magna Charta to the last act passed in this session of parliament, there is not a statute of so singular a tendency, as this statute of the 4th of king George the 2d : this will appear in the clearest manner, as we advance in the exposition of the nature and operation of it. The fortunes of many individuals, as well as their claim to the

* It is a matter well worthy the consideration of the legislature, how they permit the law to remain as it now stands : it is clear that every American born within our former colonies, is now and for ever will be a natural born subject of Great Britain, and capable of inheriting lands in England : and by the 7th and 10th of Ann, every child born of natural born subjects out of the ligeance of the king of England, is a natural born subject himself to all intents, constructions, and purposes whatsoever ; thus by the continuing operation of these statutes, the Americans in *infinitum* will be entitled to the rights of british subjects, whilst we receive no sort of compensation from them, for admitting them to such beneficial participation of our laws."

most

most valuable rights and liberties of our laws and constitution depend upon it. That there is a common law, and a written law of this country, no man will deny ; and it will be as readily admitted, that by both or one of them, the right of every man shall stand or fall. It is undeniable, that the widest extent of human power over creatures, is vested in the parliament of Great Britain, over all british subjects : and that if parliament will positively enact a thing that is unreasonable, yet is there no power upon earth which can controul it. Even the common law of the land gives place to a statute : yet when a statute is once made, it's operation shall be ruled by the living voice of the law, which are the decisions of the courts of justice ; and these decisions are governed by certain rules of uniformity and consistency, founded upon their own precedents.

The most enthusiastic assertors of parliamentary prerogative, have never attempted to invest them with the attribute

bute of infallibility. In fact, if omissions, difficulties, uncertainties, inconveniences, repugnancies, and contradictions, could not be found in statutes, explanatory, enlarging, restraining, and repealing acts would have no existence. And the language of our courts of law is decisive upon the subject.* “ It appears in our books, that in many cases the common law will controul the acts of parliament, and sometimes adjudge them to be utterly void : for when an act of parliament is against common right and reason, or repugnant or impossible to be performed, the common law will controul it, and adjudge such act to be void.” It being then the doctrine of our law, that an act of parliament may be against common right and reason, and may contain a repugnancy or impossibility, and may be therefore avoided ; every attempt to elucidate the law and to establish the rights and liberties

* Rep. S. 118. Dr. Bonham's Case.

of our countrymen, should be supported by all true patriots. It is the quintessence of our constitution, that no man shall be injured or deprived of his property, rights and liberties, any more than of his life, without cause; this cause must appear from the express words of the law. Nay even Mr. Locke* goes further in asserting, “ that
 “ the supreme power cannot take from
 “ any man, any part of his property
 “ without his own consent: for all the
 “ power the government has, being only for the good of the society, as it
 “ ought not to be arbitrary and at
 “ pleasure, so it ought to be exercised
 “ by *established* and *promulgated* laws :
 “ that both the people may know their
 “ duty, and be safe and secure within
 “ the limits of the law, &c.”

It would be derogatory from the dignity of the constitution, to suppose that the great charter of our liberties had lost any degree of force and effect since

* Locke 2d treatise concerning government, sect. 138.
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the celebrated Algernon Sidney said :
 “ * Magna Charta instead of being su-
 “ perannuated, renews and recovers it’s
 “ pristine strength and athletic vigor,
 “ by the petition of rights with our
 “ many explanatory or declaratory sta-
 “ tutes.” To use therefore the language
 of the bill of rights, *it is the true an-
 cient and indubitable right and liberty of
 the people of this kingdom, that the fol-
 lowing part of Magna Charta shall be
 firmly and strictly holden and observed ;*†
 “ No freeman shall be taken, or impris-
 “ soned, or be disseized of his freehold,
 “ or liberties, or free customs, or be
 “ outlawed or exiled, or any other way
 “ destroyed ; nor will we pass on him
 “ or condemn him, but by the lawful
 “ judgment of his peers, or the law of
 “ land. We will sell to no man, we will
 “ not deny or defer to any man either
 “ justice or right.” Under the sancti-

* General view of government in Europe, sect. 4.

† Magna Charta, c. 29.

on then of the highest authority, that an act of parliament may be against common right and reason, and repugnant and impossible, and therefore of itself void, and that justice and right will not be denied or even deferred to any man who claims it, we shall proceed with confidence and safety in our pursuit. The assertion of the rights and liberties of the subject, is an undertaking, against which no briton shall dare to set his face : everyman should adopt the maxim, *fiat justitia, ruat cælum.*

The principles, upon which a free man asserts his claim to the rights and liberties of the laws and constitution, cannot be too clearly expressed. An act of parliament which is beneficial to the generality of the nation, and contains an exception of certain descriptions of persons, shall be construed largely for those, to whom it is beneficial, and strictly against those, who are comprized in the exception ; for to them the statute is restrictive and disabling.

And

And in these later cases, it is not sufficient to find out the intention of the legislature, to exclude certain individuals from the general benefit accruing to the rest of the nation, and thus to subject them to an actual restriction or disability ; but the act must contain words, which are unequivocal, express, consistent, and operative for the purpose intended. Thus was the legislature's intention sufficiently clear in the 1st of Edward the 4th, that every man who should be convicted of horse stealing, should not have the benefit of clergy ; but because the statute used the word *horses*, therefore the judges conceiving that this did not extend to him, who stole but one horse, advised a new act for that purpose, which was accordingly made in the following year. And it must administer real comfort to every person, who tenders the liberty of the subject, to reflect and perceive that the law hath been uniformly steady in it's effects during the continuance of several

several centuries. Thus to come nearer to our own times ; * the intention of the legislature was manifestly clear, in attainting Thomas Gordon, Lord of the Achintoule, of high treason, to attaint that Gordon, Lord of Achintoule, who had been guilty of rebellion ; and this was the more palpable, as there was no other Lord of Achintoule then existing ; but as the name of the Lord of Achintoule, who had committed treason, was *Alexander*, and he was by mistake in the act, called *Thomas*, therefore was the act of attainder judged to be void, and the person, who was publickly known to have committed the treason, was preserved from the penalties intended to have been inflicted upon him by the act of attainder, by force of the common law of the land, which has established the rule, that *penal disabling and restrictive statutes shall be construed strictly*. For says the reporter

* 1 P. Willms. 616.

of the case “ As to what is said, that
 “ this being an attainder by parliament,
 “ differed from an outlawry, and that
 “ the course of parliament made it
 “ good; it was answered, that im-
 “ peachments in parliament differed
 “ from indictments, and might be justifi-
 “ fied by the law and course of parlia-
 “ ment; but that there was no other
 “ method of construing an act of par-
 “ liament (as this was), but according
 “ to law.”

It cannot certainly be said, that the
 intention of the legislature was in this
 instance doubtful or obscure: for it
 appears by my lord Coke * “ That if
 “ lands be given to Robert earl of
 “ Pembroke, where his name is Henry,
 “ to George bishop of Norwich, where
 “ his name is John &c: for in these
 “ and the like cases, there can be but
 “ one of that dignity or name; and
 “ therefore such a grant is good, albeit
 “ the name of baptism be mistaken.”

Now the intention is equally clear, in the act of the attainder, as in the grant : but the difference is ; the one shall be construed strictly and according to the letter, and the other largely and by equity.

If the law then shall protect even the guilty from punishment and disabilities, for want of express consistent and operative words in a penal or disabling statute, how much more tender shall it be of excluding innocent and unoffensive persons from their property and their rights and liberties, as Englishmen, when the words of the disabling statute are ambiguous obscure or repugnant.

This statute of the 4th of George 2d, recites “ That some doubts had
“ actually arisen upon the construction
“ of the aforesaid clause of the 7th of
“ Queen Ann : and for explaining the
“ same and to prevent any disputes
“ touching the true intent and mean-
“ ing thereof,” thea it was made : from
which preamble we should be induced

to suppose that the act was merely explanatory of that clause of the 7th of Queen Ann. But the contrary, I apprehend, will clearly appear.

An explanatory statute may be strictly defined; an act of parliament, which maketh no new law, repealeth no former law, nor enlargeth or contracteth the law explained. Every explanatory act differs also from a declaratory act: the latter only declares by statute that, which before subsisted by common law: the former essentially imports a reasonable degree of possible doubt, ambiguity, difficulty or obscurity in the act explained, or, that it had actually been misconceived or misconstrued. Thus in the clause of the 7th of Queen Ann, it is a reasonable doubt, whether the words, *children of all natural born subjects*, shall not extend to every child of every natural born subject, or only to every child whose parents were both of them natural born subjects. The explanatory law then sets the matter out of all

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doubt

doubt, by rejecting both these senses : and declaring the meaning to be, that every child, born abroad, shall be intitled to the benefit of the act, whose *father* was a natural born subject at the time of the birth of the child : thus not requiring the ligeance of both parents, nor yet being satisfied with the ligeance of the mother alone ; and so far this first clause of the 4th of George 2d is strictly explanatory.

When a statute has been explained, the law is strictly the same as it was before the explanation, neither repealed, enlarged or restrained : and the explaining act and the act explained, make but one law, and the new explaining words are taken as the words of the act explained, and as it were incorporated with it and substituted in lieu of the doubtful, ambiguous, obscure or deficient words thereof. Thus from the passing of the 4th of George the 2d, any person born out of the ligeance of the crown of Great Britain, claiming the benefit of that act,

needs

needs only to prove that at the time of his birth, *his father* was a natural born subject; and no body can set up a just claim unto it, whose father was not so: and if at any time between the passing of the two acts, that is, from the year 1708 till the year 1731, any case had been determined to the contrary of this explanation, such determination would lose all its force, and be no longer law: for an explanation is nothing more or less, than the exposition of the sense, in which the statute ought to have been understood, and the explanation shall govern the operation of the statute explained from the time of it's having passed into a law: so a child born in France in the year 1714 of an English mother, whose husband was a Frenchman, cannot claim to be a natural born subject of Great Britain under the 7th of Ann, although the explanation of the statute was made sixteen years after his birth: not that the right was vested in such child, and afterwards taken out

of him by an *ex post facto* law ; but the sole effect of the explanation is to declare, that the right never did accrue under the 7th of Queen Ann. The 4th of George the 2d, ceases to be explanatory, if it produces any effect, which cannot by construction be given to the words of the 7th of Ann, in their true legal meaning or common acceptation. Be it then admitted, that the first clause of the 4th of George the 2d is explanatory, yet the second clause is clearly of a different complexion : being in it's nature an excepting or restraining clause, which in fact becomes a new law.

The clause in the 7th of Queen Ann contains only four points, which are susceptible of explanation : the 1st is, whether the benefit of the act shall depend upon the capacity of both or either of the parents ; and this has been explained : the 2d is, what parents are to be accounted natural born subjects themselves ; the 3d is, what parts shall be deemed within or without

out the ligeance of the crown of Great Britain : and the 4th, what is the benefit conferred by the act. The 1st of these four points is the only one, which the 4th of George 2d, undertakes to explain.

We have seen, that it is of the essence of an *explanatory* law, neither to extend or contract the effects of the explained law : for so, the explanatory statute and the statute explained would make two distinct laws : It is certain that the legislature may either enlarge or restrain any law, but it is more certain, that if they do it by act of parliament, such act will not be an explanatory, but a new law : for the parliament cannot alter the nature and essence of things. It is therefore consequently impossible, that parliament should make an act *universally* beneficial, which contains an exception of several persons indefinitely : it must in it's nature, be only *generally* beneficial, if it contains *any* exception of persons. Now the word *all* without any excep-
tion

tion annexed to it, is a term of universality; but the annexing of an exception, reduces it's nature from universal to general. The clause of the 7th of Ann is absolutely universal; the 4th of George the 2d, if it hath any effect, is only general in it's operation: the two acts therefore differ essentially in their nature, and therefore one cannot be merely explanatory of the other. It can be no exception, if without it, the persons excepted were not included in the universal term: thus if the parliament grant a benefit universally to all the natives of Ireland, it is no exception to exclude the natives of Jersey from such benefit, because they were not included in the universal term: but it is an exception to say, that the benefit shall not extend to the natives of Dublin, because they were included in the universal term: and it is as evident, that such an exception cannot by possibility be an explanation of the universal term, since it effects the absolute change

change of it's nature: for the explanation of words shall neither dilate or contract their original meaning or effect. Upon the foregoing principles, there arises an absolute impossibility, that an act of parliament shall be said to be merely explanatory, which in order to produce any effect, abolishes the common law of the land, which was consistent with the statute explained: now as the two statutes make but one in law, it is repugnant that the statute explaining and the statute explained should verify two contrary propositions: but it is true and consistent with the clause of the 7th of Ann, that the child of an Englishman attainted or of one serving an enemy is the child of a natural born liege subject by the common law: and if the 2d clause of the 4th of George the 2d, hath any effect, it is not true or consistent with it, that the child of an attainted Englishman, or of one serving an enemy, is by common law the child of a natural born liege subject of England:

England : the truth of this is so obvious, that it will be frivolous to adduce proofs of it ; for it is the very being a natural born subject, that constitutes the guilt of serving against that crown, to which the natural born liege subject owes his ligeance ; and no man will be so extravagant as to say, that an attainder or such foreign service dissolves or annuls the legitimacy of the issue of the party attainted.

It would be insulting my readers, to add arguments to such plain positions. It will not however be improper for their satisfaction, simply to recapitulate the wonderful meaning, sense, extent, conditions, force, operation, and effects, which the parliament sitting in the year 1708 actually did give, and annex to the before recited plain words of the 7th of Queen Ann : for if every thing expressly enacted by the 4th of George the 2d, was not actually contained in the 7th of Queen Ann, it ceases to be a mere explanation thereof. The generous legislators of that day

day gave credit to their posterity for too comprehensive understandings; the experience however of 23 years taught them in the year 1731, that the understandings of men were in that space of time so hebetated, that they totally misconceived the law made in 1708, and were absolutely blinded to the extent of it's effects; it might not be difficult to say, what particular circumstance in the year 1731, convinced the legislature of this rapid decline in the intellects of the nation, during the preceding 23 years. However such it was; and in order to prevent future generations from running blindly into the same path of ignorance and stupidity, we are now all bound by act of parliament, to understand, know and believe, that when the legislature in the year 1708 made that simple clause of the 7th of Queen Ann and ratified and confirmed it again in the year 1711, that it not only intended and meant, but actually did, by force of the words it then used, ex-

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cept

cept out of it, the following descriptions of persons, viz. 1st the children of every father, who at the time of their birth was attainted of high treason, by judgment, outlawry, or otherwise, either in this kingdom or in Ireland. 2^o, The children of every father, who at the time of their birth, was liable to the penalties of high treason or felony, in case of his returning into this kingdom or Ireland, without licence. 3^o, The children of every father, who at the time of their birth, was in the actual service of any foreign state at enmity with Great Britain. But our understanding, knowledge, and belief by act of parliament, is not confined to this; for the legislature in the year 1708, further declared and enacted by the words of the clause of the 7th of Queen Ann, that these very exceptions were all to depend upon certain acts, or circumstances of the persons excepted: for it was at the option or in the power of any excepted person, to defeat the exception

ception in his own regard, 1^o by living two years in England, and professing the protestant religion, 2^o by dying a protestant in this country. 3^o By being in the receipt of the rents of any lands, tenements, or hereditaments in Great Britain or Ireland for the space of one year: 4^o by selling, conveying or settling for a valuable consideration and *bona fide*, any lands tenements, or hereditaments, in Great Britain or Ireland, so that the person claiming under such sale conveyance or settlement, should be for six months in the actual possession or receipt of the rents and profits thereof. But the most singular part of the whole is, that the legislature in 1708, which intended and did actually make the exceptions, as well as it gave the power of defeating them, should have made the exceptions to be perpetual, and confined the conditions or powers of defeating them to the space of 23 years. It will be proper to consider the particular nature of each of these powers: as to the

first: it was extraordinary, to annex a benefit to the profession of the protestant religion for two years, and not require the continuance of the condition, whilst the benefit should last: as to the 2d it could evidently be only intended for the benefit of his posterity; and they were at that time enabled by the 11th and 12th of William to derive their title through their alien ancestors. As to the 3d, the law could have cast the descent of no lands upon him (being an alien), of which he might receive the rents and profits: and as to the 4th, what purchaser could be found so simple, as to give a valuable consideration for lands which the grantor never could have taken by act of law, and consequently could never have a right to grant? As the space of 23 years, during which, the defeating powers were to last, hath been long since determined, no person born since the year 1731, can be otherwise affected by them, than in claiming or deriving a title

title to lands, as heir or a purchaser, unto or through the person benefited by any of them.

Far be from me the idea, that the legislature cannot enact a law, by which the extent, operation, and effect of the 7th of Queen Ann shall be governed by the sense of the 4th of George the 2d : but such a law must essentially be a new law ; for it far exceeds the nature of an explaining law, as, it is hoped, hath been clearly proved. From what hath heretofore appeared, it follows necessarily, that the persons excepted out of the 4th of George 2d, either were included in the universal words of the 7th of Queen Ann, or they were not : if they were included, then the exception of them by a subsequent statute, cannot in it's nature be an explanation of the general or rather universal term contained in the 7th of Queen Ann : and therefore this last statute, if affected at all by the 2d clause of the 4th of George the 2d, was thereby restrained in the universality of it's operation ;
and

and this could only be done by a new law : if they were not included in the universal term, it was nugatory in the legislature to attempt to except them out of it : and then the operation of the common law must decide this point, whether the child of an attainted father, was and is admissible to every benefit which the legislature or the common law holds out to all subjects of this country indiscriminately : in other words, whether such a child was a subject of this country.

We will conclude this consideration by an appeal to the understanding of every individual, and of the legislature in general, whether in the use of the word *all*, several special and particular exceptions shall be intended or implied, when the term is not actually qualified by any express exception being annexed unto it.*

* Co. Lit. 147. If they will be satisfied with the answer of my lord Coke, the argument must be conclusive. *Ubi nulla est ambiguitas in verbis, ibi nulla expositio contra verba expressa fienda est.*

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The second clause then of the 4th of George the 2d, if it hath any effect at all, is to all intents, constructions, and purposes whatsoever, a new law, viz. a statute restraining the 7th and 10th of Queen Ann: and if, being a new law it acteth retrospectively from the passing of the act which it restrains, according to the words *did, doth, or shall extend*: then will it be the first precedent of a disabling and restrictive *ex post facto* law, which ever disgraced the code of any municipal laws, much less those of a free people. Every Englishman is free to say, that this arbitrary and despotic system of enacting *ex post facto* laws, is absolutely incompatible with the rights and liberties of Magna Charta, and consequently unconstitutional: the internal conviction of every man demonstrates that the law of civilized nature secures to him in the loss or injury of his property and person, some redress or relief. The man who is aggrieved by the retrospective operation
of

of an *ex post facto* law, may lose his property, his rights and his liberties, which the law hath actually vested in him, and be thereby excluded from every possible redress, without having had either the physical or moral power of preventing his loss, injury, or disability. It is evident, that if the 2d clause of the 4th of George the 2d hath any effect, it is that of an *ex post facto* law, which in reality must affect every person born before the year 1731, in themselves and posterity for ever. Mr. Lock's words, *established and promulgated laws*, shall certainly not include an *ex post facto* law : for that can neither have any prior establishment, or have received a promulgation. The court hath once determined, *that a statute against common right and reason, is of itself void*, as we have seen. Be it to the legislature and judges of this country, to determine if an *ex post facto* law, be of this description.

Too deplorable to be described, would be the condition of persons suffering

tering the loss of every thing dear and valuable to themselves and families, under an *ex post facto* law, if any such law had effect in this country : for altho' an attempt was made, and the intention of the legislature evidently was, to give this effect to that statute of George 2d, yet a blessed fatality effectually intervened in the passing of this act, in behalf of the liberty of the subject, and the rights of the laws and constitution.

It hath before been said, “ *When an act of parliament is against common right and reason, or repugnant or impossible, the common law will controul it, and adjudge such act to be void.*”

I do not find any period of time, during which this doctrine has been overuled or contradicted. Several years after the determination of Dr. Boneham's case, the Lord Chancellor Hatton lays down the same doctrine* in as positive terms, as if

* Treatise concerning statutes and acts of parliament, and the exposition thereof, 18.

it were a postulatum. “If the mind and
 “ words of the law be clean contrary, that
 “ law or statute is void, *ubi manifeste pug-*
 “ *nant legis voluntas & verba, neutrum*
 “ *sequendum est. Verba, quia non con-*
 “ *gruunt menti, mens, quia non congruit*
 “ *verbis.*” What more clear than that the
 mind of the law was, that the children
 of attainted parents born abroad should
 be excepted out of the 7th of Ann, and
 the 4th of George 2d; and therefore
 should become or remain aliens? what
 more clear than the words, that such
 children should remain in the same state,
 plight, and condition, to all intents,
 constructions, and purposes whatsoever,
 as if the act, which expresses the mind
 of the law, had never been made? And
 the same learned Chancellor continues,
 “ Out of the premises ariseth the solu-
 “ tion of one great doubt; which is,
 “ whether the parliament may err or
 “ not: for it is lately declared, where-
 “ in it hath erred. And though there
 “ be no court higher, to convince or
 “ pronounce upon the error, yet when
 “ the

“ the matter is plain, every judge may
 “ esteem of it, as it is, and being void,
 “ is not bound to allow it for good and
 “ forcible.” And elsewhere he further
 says, “ I agree that those statutes,
 “ which are grievously penal, and those
 “ that derogate from the common law,
 “ and those that save not in their gene-
 “ ral disposition, persons commonly in
 “ all law favored, as infants, femes co-
 “ verts, men beyond seas, men in ser-
 “ vice of their prince, such as are im-
 “ prisoned, such as are of non sane me-
 “ mory, must be strictly taken.” And
 of such tendency, it must be allowed,
 is the 4th of George 2d, particularly as
 to infants.

It hath been, it is presumed, fully
 proved, that the 4th of George the 2d
 was a new law as to it's 2d clause ;
 and consequently was an *ex post facto*
 law : whether such a law be or be not
 against *common right and reason*, is for
 others to decide. As the 2d clause of
 the 4th of king George the 2d, is essen-
 tially of a different nature from the first

clause of the same act, it is very possible, that one of them shall be good and valid, whilst the other shall be null and void.

Every repugnancy or impossibility of an act of parliament, or of a clause, or of a sentence in an act of parliament, must carry it's own evidence upon the face of it. If it do not carry with it this self evidence, it will be vain and idle to apply facts, proofs, or arguments to establish it. The naked exposition of the repugnancy or impossibility must carry it's own conviction. Be it then attended to, that this clause enumerates certain descriptions of persons to whom it says, that the benefit of the 7th and 10th of Queen Ann, did not and shall not extend : “ *but that all such children*
 “ *are, were, and shall be, and remain in*
 “ *the same state, plight, and condition, to*
 “ *all intents, constructions, and purposes*
 “ *whatsoever, as they would have been in,*
 “ *if the said act of the 7th year of her*
 “ *said late Majesty's reign, or this pre-*
 “ *sent act had never been made.*”

It

It hath, I trust, been sufficiently proved, that the second clause of the 4th of George 2d, is not an explanation of the 7th of Queen Ann: but altho' it should be so allowed, it will work no difference or obstacle to the present purpose, of shewing the repugnancy and impossibility of the clause: it will in the one case be considered as an original exception in the 7th of Queen Ann, and in the other, a restraining clause in the 4th of George the 2d. It must then be allowed, that if the persons described in this clause of the 4th of Geo. 2d, are in any manner affected, it must be by the exception or by the restriction: if they are in no manner affected by it, then they stand precisely, as if this particular clause had never been made, and consequently neither excepted out of the benefit of the 7th of Ann, or restrained by the 4th of George the 2d, from claiming their right under it. One of the two alternatives must be admitted; either they are affected by the clause, or they are not: the admission
of

of either of these alternatives, demonstrates the repugnancy of the clause : if they are affected by it, then it is repugnant and impossible, that they should be in the same state, plight, and condition, to all intents, constructions, and purposes whatsoever, as they would have been in, if the very act which contains the clause that affects them, had not been made : for they then would evidently not have been so affected ; and so the same clause, which enacts that they shall be affected, counteracts its operation, by enacting that they shall not be affected ; which is most glaringly repugnant and impossible. If they are *not* affected by it ; then is it repugnant and impossible for the legislature to prevent the effects of the 7th and 10th of Ann, from extending to them, by a clause which does not *affect* them.

A person under a disability, is manifestly not in the same state, plight and condition, in which he was before he incurred the disability : now, before the

7th of Queen Ann, the son of an attainted Englishman, laboured under no disability, which the son of an Englishman not attainted, did not also labour under. And the 4th of George the 2d, (whether by exception or restriction it matters not) imposes a disability upon the child of an attainted father, to claim a benefit, which, had his father not been attainted, he could have established an undoubted right unto : And this must essentially alter his state, plight, and condition from what it was before : it is therefore an absolute repugnancy to do that, which alters the condition of a man, and leave him in the same state, in which he was before his condition was altered.

I am at a loss to place this repugnancy and impossibility in a clearer point of view than I already have. It may tend to disclose this matter with greater perspicuity, if we consider how the clause might have been framed without the repugnancy. If it had been enacted by the clause, that nothing in the 7th and

10th of Ann, had extended or should extend to intitle the persons described therein to the benefit intended by those acts, without saying any more: then indeed the clause would have retained the hardship of *an ex post facto* law, but would not have been repugnant or contradictory to itself.

The last words of the clause, which say that all children of attainted fathers, &c. born abroad, *shall be in the same state, plight, and condition, to all intents, constructions, and purposes whatsoever, as they would have been in, if the said acts of the 7th and 10th of Ann, and this present act had not been made*; are essentially of such a repugnant quality, that must necessarily have defeated whatever had been enacted concerning the children of attainted parents born abroad, beneficial or prejudicial to them: For words cannot more emphatically express, that no child of an attainted father born abroad, shall even by possibility be affected with any thing contained in the 4th of George the 2d; if

if the very mentioning of them therefore can affect them, it is repugnant to do it: for they cannot be in any manner affected by the act, but their state, plight, and condition, shall be altered to some intent, construction, purpose, or other; and then cannot they remain in the same state, plight, and condition, to all intents, constructions, and purposes whatsoever, as if the act had not been made. To give any effect to the first part of this clause, the child of an attainted father born abroad, must be in some manner affected by it; to give any effect to the latter part of the clause, such child must in no manner be affected by it. These contrary effects cannot by possibility be produced in the same child; therefore the whole clause is in itself repugnant and contradictory, and therefore null and void, as if it never had existed; for here *manifesté pugnant legis voluntas & verba.*

X

How

How then would the children of the persons excepted in the clause of the 4th of George 2d, be intitled to claim their rights of Englishmen, if this clause were stricken out of the 4th of George 2d ? they would be as fully intitled to the benefit of the 25th of Edward 3d, and the 7th and 10th of Queen Ann, and of the 1st clause of the 4th of George 2d, as any other children of natural born subjects of England, under similar circumstances. For neither the common or statute law of this realm, has ever annexed any disability whatever to the child of an attainted father, which was not common to the child of a father not attainted. And although here we speak of the child of an attainted father born abroad, yet we speak also of other children under the same circumstance ; so that comparing them under one particular circumstance, which is common to both, is comparing them generally.

That

That investigation must be defective, which omits to say any thing, that can really throw light and perspicuity upon the subject of investigation. About the year 1731, it was well known, that many natural born subjects of this country, who adhered to the cause of the abdicated family of Stuart, were resident abroad, as appears from an edict of the French king * for obliging them to take up arms : “ His Majesty being “ informed that there is a considerable “ number of English, Scotch, and Irish, “ in his good city of Paris, and spread “ over the other towns and provinces, “ of his kingdom, &c.” Let us then suppose, (no matter how improbably) that the legislature in 1731, had it only in view and intention, to disable the children born abroad of such adherents to the house of Stuart, from claiming the rights of natural born subjects, and of course from taking the

* Detection of parliament of England, 2 vol. 499.

estates of their ancestors either by descent or purchase. Let us further suppose, that a poor Scotch Highlander born abroad of such parents, who were intended to be disabled by the act, had after it's passing, returned to his own country, to take possession of the family cottage, after the death of his father: and that this he found seized upon by his younger brother, who had been born in Great Britain: we will further suppose this difference between the two brothers, to have been settled and adjusted on the spot by themselves and neighbours; their reasons and arguments were unassisted by art, though guided by that good sense and judgment, which falls generally to the share of the inhabitants of that country.

The elder brother asserts, that although he was born abroad, yet his father was a natural born subject of Great Britain, at the time of his birth: that the legislature had passed several acts of parliament to place such sons in the

the

the same state and condition, as if they had been born in Great Britain : and that consequently he had a right to his inheritance.

The younger brother replies, that by the last act of parliament passed upon that subject, his elder brother was particularly excepted and excluded from claiming the benefit of the acts of Queen Ann : and that he consequently became an alien ; by which means he acquired the right of inheriting the cottage, of which he should maintain his possession.

Brother, says the elder, before this act of George the 2d had passed, you and I differed not in our blood : one father begat us, one mother bore us ; she was delivered of me, soon after she had landed on the continent, whither she went to attend upon our honoured father : she was delivered of you, immediately upon her return hither to take care of this very cottage, and her infant family : our father at the time of each of our births,

undoubtedly

undoubtedly received pay from the French King ; neither you or I have taken up arms, or committed any offence against the government of Great Britain : and the sole difference which was between us before this act of George the 2d, was the place of our birth ; but at the time of my birth, this was removed by the 7th of Queen Ann, and I therefore had then in me, as ample a capacity to inherit this cottage, or any other land, as you now have. And when you tell me, that this act of King George, takes away the right from me, and then the law vests it in you : I answer, this cannot be ; for it is impossible that an act of parliament should defeat my inheritance, which particularly enacts, that nothing contained in it shall extend to affect me in any manner whatever.

The good sense of the younger brother and of all the neighbours, admitted the impossibility and repugnancy, of the elder brother's being disinherited by a statute, which expressly enacts
that

that he shall after it's passing, be and remain in the same state, plight, and condition, in which he was before it passed. And the possession was accordingly delivered up to the elder.

The last act, which I find in our statute books, relative to this subject, was made so lately as in the 13th year of his present Majesty. It is to be presumed, that some particular end and purpose was proposed by it : but after the consideration, which has been given to the foregoing naturalizing acts, it must certainly be allowed to operate no effect, which was not before produced by the naturalizing acts of Queen Ann, and King George the 2d. It recites, that, "Whereas divers natural born
 " subjects of Great Britain, who profess and exercise the protestant religion, through various lawful causes,
 " especially for the better carrying on
 " of commerce, have been and are obliged to reside in several trading cities,
 " and other foreign places, where they
 " have contracted marriages, and
 " brought

“ brought up families. And whereas
 “ it is equally just and expedient, that
 “ the kingdom should not be deprived
 “ of such subjects, nor lose the benefit
 “ of the wealth, that they have ac-
 “ quired ; and therefore that not only
 “ the children of such natural born
 “ subjects, but their children also,
 “ should continue under the allegiance
 “ of his Majesty ; and be intitled to
 “ come into this kingdom, and to bring
 “ hither and realize, or otherwise em-
 “ ploy their capital : but no provision
 “ hath hitherto been made to extend
 “ farther, than to the children born out
 “ of the ligeance of his Majesty, whose
 “ fathers were natural born subjects of
 “ the crown of England, or of Great
 “ Britain.” And then enacts, “ That
 “ all persons born, or who after shall
 “ be born out of the ligeance of the
 “ crown of England, or of Great Bri-
 “ tain, whose fathers were or shall be,
 “ by virtue of the aforesaid statute of
 “ King George the 2d, intitled to all
 “ the rights and privileges of natural
 “ born

“ born subjects of the crown of Eng-
 “ land, or of Great Britain, shall and
 “ may be adjudged, and taken to be,
 “ and are hereby declared and enacted
 “ to be natural born subjects of the
 “ crown of Great Britain, to all in-
 “ tents, constructions, and purposes
 “ whatsoever, as if he and they had
 “ been and were born in this king-
 “ dom.”

It is evident from this preamble,
 that the statutes of the 7th of Ann and
 4th of George the 2d, are beneficial
 both to the parties claiming under
 them, and to the crown ; and there-
 fore are to be construed largely and
 equitably : now it appears as clear as a
 first principle, that a person born abroad
 whose father and mother were natural
 born subjects of Great Britain, may
 claim the benefit of the 7th and 10th of
 Ann, and the 4th of George 2d : and
 it is equally clear, that a person may
 be a natural born subject of Great Bri-
 tain by statute law, as well as by com-

mon law. By what sort of construction then, shall these beneficial statutes be made to extend their benefit to the children born abroad of parents, who were *natural born subjects* by the common law, and withhold it from such children, whose parents were *natural born subjects* by the statute law? The admission of such a construction, would essentially annul the effects of every naturalizing statute : for the very essence of such acts is, to make the persons benefited by them, natural born subjects of this kingdom, to all intents, constructions, and purposes whatsoever, as if they had been actually born within the allegiance of our king ; and it is self-evident, that they cannot be so, if their children remain incapable of inheriting their estates, in those cases, in which the children of persons born within the allegiance of our king, are capable of taking their father's inheritance. May even the very strictest construction of the 7th of Queen Ann, shall

shall never go to exclude the children, whose fathers and mothers were natural born subjects by statute, unless it establishes this doctrine, that a person, who was not a natural born subject by the common law, cannot be made such by the statute law; and this would defeat the very essence and effect of the 7th of Queen Ann. It follows then, that by no construction whatsoever, can it be said in truth, that the effects of the 7th and 10th of Ann, and the 4th of George 2d, are confined to the children born abroad of parents, who were themselves born within the allegiance of our king: and not also to the children of such children. It is not the purpose of this investigation, to defend and justify the absurd or inconvenient consequences, which may flow from the law as it now stands, but only to disclose what those consequences really are: and this has in part been done in the foregoing sheets

When therefore it is said in this preamble, *that no provision hath hitherto*

been made to extend farther than to the children born out of the ligeance of his Majesty, whose fathers were natural born subjects of the crown of England, or of Great Britain: the real consequence that flows from these words; is not, as the enacting part of the statute supposes, therefore no provision is made for the children, whose parents are natural born subjects by statute; but therefore no provision is made for the children, whose fathers were not, or whose mothers only were natural born subjects. And from what has been before said upon this subject, it is conclusively evident, that the only doubt, which arose upon the clause of Queen Ann, was, whether such right of being a natural born subject, should accrue to a child born abroad, through his mother, as well as through his father: and the 4th of George 2d solves this doubt, by confining the benefit to the children, whose fathers were or shall be natural born subjects.

But

But this statute of his present Majesty, does not confine itself to extend the provision of the 4th of George the 2d, to the children of such children born abroad, whose fathers were natural born subjects ; which certainly was unnecessary ; but it introduces a new penal law against the Roman Catholics of this kingdom, by subjecting them to a disability, which was before unknown to them : for certainly before this act, the child of a Roman Catholic father was as clearly intitled to be a natural born subject, under the 7th of Ann, and the 4th of George the 2d, as the child of a father of any other persuasion : the Roman Catholics are not excepted out of either of the acts of Ann, or of George the 2d ; nor is the conformity with the established religion by either of them, made the requisite condition, to entitle a person to their benefit. Whoever gives himself the trouble to throw his eye upon the very many and heavy penal statutes still in force against the Roman Catholics of
this

this country, will certainly not incline, in this age of general toleration, to add to their number or severity.

There are some other means of acquiring the rights of naturalization in this country, besides those of a private act of parliament, which it will be proper to mention, before we conclude this investigation: * as, by serving two years on board British ships, upon proclamation in time of war: † by residing seven years in the British Colonies in America: ‡ by serving three years in the whale fishery: || and by serving his Majesty two years in America.

* 13. Geo. c. 3.

† 13. Geo. 2. 7.

‡ 22. Geo. 2. c. 45.

|| 2. Geo. 3. c. 25.

A P P E N D I X.

SINCE the above sheets were written, the author has received the consent of the noble family, which is most deeply concerned in the points of law, which have been the subject of his investigation, to publish and apply their case to the doctrine already laid down. There may be some descriptions of men, who think all reasoning upon a legal subject, to be artificial, and the inferences deduced therefrom to be no more than a fiction of certitude. Upon these persons, the application of a living example, may act as a prism, to analyze and dissolve the mixt assemblage of colouring, under which the object was represented to them, into their true original and primæval colours.

It may not be improper to preface this case with some few positions and principles, laid down by the learned
author

author of the considerations on the law of forfeiture. * “Corruption of blood, says he, goes only to estates descending in the course of inheritance. *Nothing the heir takes by purchase is affected by it.* He is capable under a testamentary devise, or family settlement, or legal grant of any kind to himself.” † In another place, he says, “It were better to have no law nor penalties to enforce law, nor the very form of civil government, than to receive only an ensnaring protection from it,” and elsewhere “The saying is, and it deserves to be engraven on the hearts of judges, *that it is better ten guilty men should escape, than one innocent suffer.*

In the year 1691 by indentures of lease and release several manors, lands, and hereditaments, in the counties of

* Considerations on the law of forfeiture, p. 89.

† Ibidem 130.

Northumberland, and Cumberland, were settled, limited, and assured, to Francis Earl of Derwentwater, for life, and after his death and subject to a trust for raising 5000l for his daughter, and to several annuities payable to his four younger sons for their respective lives, to the use of Edward Lord Viscount Radcliffe and Langley, (the eldest son of the said Francis Earl of Derwentwater,) for life, with remainders successively to James Radcliffe, and Francis Radcliffe, the only two sons of the said Viscount then in being, in strict settlement, and to his 3d, 4th, 5th and other sons in tail male: with remainders successively to the four younger sons of the said Francis Earl of Derwentwater in strict settlement: remainder to the said Francis Earl of Derwentwater in tail general: remainder to his right heirs for ever.

Upon the death of the said Francis Earl of Derwentwater, the said Edward, his eldest son and heir, became Earl of Derwentwater: and the said Edward

Earl of Derwentwater upon his death, was succeeded in title and estates by his eldest son the said James, late Earl of Derwentwater: who *then* became tenant for life of the afore-said settled estates with remainder to his 1st and other sons in tail male.

In the year 1712, by lease and re-lease, in consideration of the marriage of the said James Earl of Derwentwater with Miss Webb, several manors, lands, and hereditaments, in the counties of Northumberland, Cumberland, and Durham, were settled to take effect after the solemnization of the marriage, subject to a term of 99 years limited in part of the premises, which is since determined, to the use of the said James Earl of Derwentwater for his life, remainder and subject to the jointure of his wife, and to a term of 200 years (since determined) to the use of the 1st, 2d, 3d and other sons of the said James Earl of Derwentwater by that marriage, successively in
tail

tail male : remainder to trustees for 500 years, for raising portions for a daughter or daughters of the said marriage, in default of issue male of the marriage : remainder to the use of the said James Earl of Derwentwater in tail male : remainder to the said Francis Radcliffe 2d brother of the said James Earl of Derwentwater for life ; remainder to his 1st and other sons in tail male : remainder to Charles Radcliffe the 3d brother of the said James Earl of Derwentwater for life, remainder to his 1st and other sons successively in tail male : with proper limitations to trustees, to preserve contingent remainders during the lives of each tenant for life : with the ultimate remainder to the said James Earl of Derwentwater in fee.

The aforesaid Edward Earl of Derwentwater left three sons, viz. James, Francis and Charles : and the brothers of the aforesaid Francis Earl of Derwentwater, all died without issue. Between the 24th of June, 1715, and the

the 24th of June, 1718, the said James Earl of Derwentwater, and his brother Charles Radcliffe, were attainted of high treason: the former was soon after executed, and the latter fled out of the kingdom. Francis Radcliffe, the 2d brother of the said James, died an infant without issue: the said James late Earl of Derwentwater left one son, named John, and one daughter, named Anna Maria.

By the 1st of George the 1st c 50 it was enacted, that all the lands, hereditaments, rents, reversions, services, remainders, possessions, &c. whereunto any person or persons attainted, between the 24th days of June, in the years 1715 and 1718, for high treason committed before the 21st day of June in the year 1716, were intitled, were declared to be forfeited to, and were thereby vested in his then Majesty, his heirs and successors, for the use of the public, according to the several and respective estates

estates and interests, which such attainted persons had therein ; and where any of the person or persons attainted or to be attainted, within such days and times as aforesaid, were seized of an estate tail *in possession*, in any such hereditaments, or premises, the same was enacted and declared to be vested in his Majesty, his heirs and successors, in fee simple ; to the end, the same might be absolutely sold, disposed or applied, according to such acts of parliament, as should thereafter be made in that behalf. And by the same act, as also by the 3d of George 1st, all persons (except such forfeiting persons, their representatives, or trustees, and persons claiming an estate in remainder or reversion, expectant upon the determination of any estate tail of which *a forfeiting person* was seized in possession,) having any right, title, interest, &c. in law or equity, in, to, out, of, or upon the said hereditaments and premises, were directed to make their claims before certain

tain commissioners thereby appointed, in manner therein mentioned, otherwise the said rights and interests to be null and void.

It appears manifest, that nothing was forfeited to the crown, but the rights and interest of the forfeiting persons, (except in the cases of tenants in tail in possession) : and the enacting, that persons *having* any estate or interest &c. should enter their claims, presumes that the persons so directed to enter their claims, must be in *esse*, because they are directed to do an act, and are punished for their neglect by the forfeiture of their rights, in default of such claim made : and that these acts could extend only to make null and void, the estates of such persons, as then had estates in them, and could claim them, but omitted so to do ; and not to make void the contingent estates of persons unborn, in whose behalf, the acts have omitted to appoint any person to claim : as was provided in the case of infants, femes covert,

covert, idiots and lunatics. So that the case of contingent remainders, was omitted out of the act, and such estates were neither forfeited to the crown by the forfeiting acts, (which vest in the crown nothing more than the rights and interests of the forfeiting persons, except in the cases of tenants in tail in possession) nor were they declared to become null and void, for want of a claim.*

The estates, rights, and interests, which were vested in the late James Earl of Derwentwater, at the time of his attainder, and which were thereby forfeited to the crown, were, 1^o an estate for life in possession in all the premises comprized in the two settle-

* The following eminent lawyers were unanimous in this opinion, viz. Mr. Lutwyche in an opinion written February 24, 1731. Mr. Pigott, November 1, 1732. Mr. Fazakerley, 14th of January, 1747. Mr. Filmer, January 23, 1747. Mr. Wilbraham, May 21, 1748.

ments of 1691 and 1712. 2^o an estate in tail male in remainder, expectant upon the default of issue male of his marriage with Miss Webb, in the premises comprized in the settlement of 1712. And 3^o the reversion in fee of both the estates, expectant upon the determination of all the limitations respectively contained in the two settlements of 1691 and 1712. The estates, rights, and interests, which were vested in the said Charles Radcliffe, at the time of his attainder, and were thereby forfeited to the crown, were 1^o an estate for life in remainder, expectant upon the default of issue male of the body of his elder brother James to be begotten, in all the premises comprized in the settlement of 1712. And 2^o an estate in tail male in remainder, expectant upon the said last mentioned contingency, in all the estates comprized in the settlement of 1691.

By an act of the 4th of George 1st, all the aforesaid hereditaments and premises were vested in certain trustees

according

according to the estates and interests therein vested in his Majesty, that they might be sold, &c. and all persons having right, &c. were again directed to make their claim, before the commissioners thereby appointed, otherwise their rights to be null and void. Mr. John Radcliffe, the infant son of James late Earl of Derwentwater, exhibited by his mother and guardian before the commissioners, two several claims, by one of which, he claimed the premises comprized in the settlement of 1691, and by the other, the premises comprized in the settlement of 1712, as the right of the claimant, and the heirs male of his body : the first of these claims was allowed, the latter dismissed by the said commissioners ; but the latter decree was, upon an appeal to the court of delegates, reversed ; and Mr. John Radcliffe in consequence thereof, entered into possession of all the premises comprized in the said two last mentioned settlements, as tenant in tail male.

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By the 9th of George 1. c. 19. it was enacted, that the forfeited estates which should remain unfold after the 29th of September 1723, were thereby divested out of the said commissioners and trustees, and vested in his Majesty, his heirs and successors, for the use of the public.

On the 28th day of September, 1723, a deed of sale was executed by the commissioners to William Smith, of the aforesaid forfeited estates, according to the rights and interests therein, then vested in his Majesty, his heirs and successors, by virtue of the attainders of the said James late Earl of Derwentwater, and Charles Radcliffe, or in the said commissioners and trustees, by virtue of the aforesaid act of the 4th of George the 1st.

All the estates comprized in both the settlements of 1691 and 1712, being now vested in Mr. John Radcliffe, in tail male, nothing more was done by the legislature, whilst he lived, concerning them. In the year 1724, Mr.
Charles

Charles Radcliffe intermarried with the Countess of Newburgh, by whom he had two sons and several daughters, born in France : the present Earl of Newburgh was the eldest child of that marriage, and was born on the 25th. day of August, in the year 1725.

Some time in or about the year of our lord 1731, Mr. John Radcliffe died unmarried, and under age : and in the same year was passed the 4th of George the 2d, of which we have spoken so amply in the foregoing sheets. Upon the death of Mr. John Radcliffe without issue male of his body begotten, an estate in tail in possession, vested in Charles Radcliffe, in the estates comprized in the settlement of 1691 ; and became vested in his Majesty, (or in the purchaser William Smith) in fee simple, by virtue of the forfeiting act of the 1st of George 1st ; and also his Majesty, (or the purchaser William Smith) became in the right of Mr. Charles Radcliffe, intitled to an estate for his life in possession, in the premises

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comprized

comprized in the settlement of 1712 : and also to the reversion in fee of both the estates, expectant upon the decease of the said Charles Radcliffe without issue male of his body begotten.

In case James Earl of Derwentwater had left issue male by another venter, it might have become a question, whether the estate in tail male general, limited to him in remainder by the settlement of 1712, would upon the death of Mr. John Radcliffe, have vested in the crown by force of the forfeiture, and have continued as long, as he should continue to have issue male. But as the case happened, this estate in tail male general in remainder never came into possession after the death of Mr. John Radcliffe, for want of issue male of the body of the said James Earl of Derwentwater. The learned author of the considerations on the law of forfeiture,* expresses himself with great clarity and

* P. 85. 86.

precision upon this subject: “ There
 “ remains a material difference to be
 “ noted, between the case of a fee tail
 “ and a fee simple; * which is, that
 “ notwithstanding the forfeiture of
 “ lands entailed by an attainder, yet
 “ the blood of the attainted person is
 “ not corrupted, so as, by any conse-
 “ quential disability, to affect the issue
 “ in tail. Therefore, if the son of the
 “ donee in tail be attainted of treason,
 “ during the life of the father, and die,
 “ having issue, and then the father
 “ dies, the estate shall descend to the
 “ grandchild, notwithstanding the at-
 “ tainder; but it is otherwise in the
 “ case of a fee simple, as has been
 “ shewn in the speaking of the feudal
 “ law. The reason is obvious, because
 “ the issue in tail claims *per formam*
 “ *doni*; that is, he is as much within
 “ the view and intention of the gift or
 “ settlement, and as personally and

* 3 Co. Dowlic's case.

“ precisely

“precisely described in it as his an-
 “cestor. But this is not all. The for-
 “feiture of estates tail came in by
 “the construction of the statute of
 “the 28th of Henry the 8th. The
 “judges resolved, that the general
 “words of those statutes comprehended
 “these estates. But then such laws be-
 “ing of a penal kind, though they are
 “to be construed so, as to attain their
 “full effect, yet they are to be con-
 “strued strictly; and, however they
 “might extend to make estates tail li-
 “able to forfeiture, where they are
 “actually in the offender’s possession,
 “and consequently in his power to ali-
 “enate, they could not, by any rule of
 “construction, be extended to bring
 “consequential disabilities on the heir,
 “where the estates have not been in
 “the offender’s possession.

I need add nothing more to prove,
 that the estates comprized in the set-
 tlement of 1712, were not forfeited to
 his Majesty in fee simple, upon the
 death of Mr. John Radcliffe, than that

an estate tail therein, never was in the offender's possession.

Mr. Charles Radcliffe had at this time two sons, who, though born in France, were, as we have seen, by statute natural born subjects of England. It was as evident, that the eldest son of Mr. C. Radcliffe, could have no right to the estates comprized in the settlement of 1691, as that he should not without forfeiting it himself, be excluded from taking an estate tail in remainder, expectant upon the death of his father, in the premises comprized in the settlement of 1712. So that the present Earl of Newburgh, being, as we trust, has been fully proved a natural born subject of Great Britain, notwithstanding the attainder of his father and his own foreign birth, he, as well as his cousin german, Mr. John Radcliffe, *was capable of taking under a family settlement.*

Here then *patet atri janua ditis* : not contented with the fee simple of the estates comprized in the settlement
of

of 1691, which became now legally vested in the crown by the attainder of Mr. Charles Radcliffe, and also with his life interest in the estates comprized in the settlement of 1712 ; the parliament sitting at that time, attempted to secure the default of issue male of the body of Mr. C. Radcliffe, although he had then two sons living : by which means alone, they could also secure the reversion in fee of the estates settled in the year 1712, which would become vested in possession upon his death without issue male. The expedient then for carrying this design into execution, was to unnaturalize the two sons already born, and make them aliens : and that by an *ex post facto* restraining law, which if it hath any effect at all, is to preclude them from asserting their rights of natural born subjects under the 7th of Queen Ann. If this effect is to be produced by that act, then truly did the law give only an *ensnaring protection* to the Countess of Newburgh, who might with as much facility

facility have been delivered of her children on this, as on the other side of the water ; but the law expressly told her, that the place of the birth of the child was immaterial, provided the child's parents were natural born subjects of Great Britain : such she knew herself to be, and if such had not been her husband, he could not have been guilty of the treason, for which he was attainted ; nor could the crown have acquired a right to the fee simple of the estates comprized in the settlement of 1691, or to his life estate in the premises settled in 1712, by the forfeiture, unless these estates had vested in him ; and they could not have vested in him, if he had not been a natural born subject of Great Britain ; for such right and interest only was forfeited to the crown, as was in the forfeiting persons. This is one case indeed out of many hundreds, where the unconstitutional grievance, of suffering under an *ex post facto* law, has reduced families to extreme indigence and misery : and

if it may be permitted to judge from the assemblage and combination of all the circumstances attending it, it was the chief, if not the only, ground for making the law. So absurd, cruel and unconstitutional is it, to frame general disabling statutes to the policy or exigencies of private cases. † *Vetant leges sacratæ, vetant duodecim tabulæ leges privatis hominibus irrogari.*

Little would it have availed the government, to secure these forfeited estates, from those who, claimed them under family settlements, if William Smith the purchaser was solely to be benefited by them: it is true, that he gave but a small value for them, but then, it is also true, that the events which were to reduce the estates into possession, were contingent and remote: Mr. John Radcliffe, then was in the eleventh year of his age, he might marry and have issue male before the age of twenty-one, and if he attained that age, a common recovery might have

† Cic.

defeated

defeated the possibility of the purchaser's gaining any thing by his bargain: Mr Charles Radcliffe was also a young man, and might have children, who would exclude the purchaser from the estates comprized in the settlement of 1712, after the death of their Father. However the sale to William Smith, was after a parliamentary enquiry into the nature of it, declared to be null and void by the 5th of George 2d c. 23. The 8th and 11th of George the 2d, which direct the application of the rents of the said estates, towards building and maintaining the royal hospital at Greenwich, always add the words, *for and during his Majesty's estate and interest in the premises*; which manifestly shew, that the interest of the crown in the forfeited estates, was deemed by the legislature to be determinable upon some event or contingency, which could not be, if the fee simple thereof were vested in his Majesty.

The last act of parliament, which was passed upon this subject, was the 22d

of George 2d c. 52. In the year 1746, Mr. Charles Radcliffe was executed for the treason committed by him in the year 1715, upon the happening of which event, either the reversion in fee became vested in possession in the crown, by virtue of the attainder, upon the death of Mr. Charles Radcliffe without issue male of his body begotten, or the estate in tail male became vested in possession in the Earl of Newburgh, in the premises comprized in the settlement of 1712, as the first son of the body of Mr. Charles Radcliffe begotten.

The 25th of Edward the 3d, the 7th and 10th of Queen Ann, and the 4th of George the 2d, are all of them public and general acts: and they cannot be confined or frustrated in their effects, by a subsequent act of parliament, which does not explain, restrain, or repeal the whole or any part of them: but which only recites in the preamble a presumption, that five individuals are not admissible to the full benefit of them. This act therefore
leaving

leaving all the prior acts, which it recites, to their own operation, takes notice, that the present Earl of Newburgh, upon the death of the said Charles Radcliffe, had actually claimed the possession of the premises settled in 1712, as the interest of the crown therein had determined by the death of his father : but that the commissioners and governors of the said hospital maintained their possession, upon the ground of a want of claim, none having been put in on his behalf, within the time limited by the 1st and 4th of George the 1st : and that the said Earl of Newburgh, was then absolutely unable to bear the expence of litigating the points, whether such claim was necessary on his behalf, and whether he was to be deemed an alien under the clause of the 4th of George the 2d : neither of which points the act undertakes to determine ; and they are therefore still open to discussion. The act further recites, that his Majesty was graciously inclined, that some relief

relief should be granted to the said Earl of Newburgh; so as the same should be consistent with the rights of Greenwich hospital; and that the fee and inheritance of all the aforesaid estates might be absolutely vested in trustees, for the use and benefit of the said hospital for ever, free and discharged from all the right, title, claim and demand of the said Earl of Newburgh, and of his Majesty in his right, and of all others claiming by or under any of the limitations contained in the settlement of 1712: and it further recites, that the said Earl of Newburgh was consenting, that all the right, title, and interest, which he or his issue male, had or could have to the premises comprized in the settlement of 1712, should be extinguished by authority of parliament, and that the absolute fee simple and inheritance of the said premises should be so vested in the royal hospital at Greenwich, and their successors for ever. And it is remarkable, that the act avoids determining

ing the point, whether the Earl of Newburgh and his brother were aliens: for in vesting the estates in the trustees, it uses these ambiguous words, freed and absolutely discharged from all such right, title, estate, interest, claim, and demand, as is vested, or *that could or might accrue or belong to his Majesty, his heirs, or successors*, by reason or means of the said Earl of Newburgh's having been born out of the dominions of the crown of Great Britain: but when it mentions the right, which accrued to the crown by virtue of the attainder, it is *absolutely and unequivocally, freed and discharged* from all such right, title, estate, interest, claim, and demand, *as was vested &c.* The reason of this is obvious: it was an unquestionable point in law, that some right accrued to the crown, by virtue of the attainder, but it was not in the slightest degree certain, that any right accrued to the crown by the Earl of Newburgh's having being born in France. However 30,000l were direct-

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ed to be raised off the estates comprized in the settlement of 1712, under the trusts of a term of 500 years created therein: 6000*l.* of which were to be paid to the younger children of the said late Countess of Newburgh, and the remainder to the present Earl of Newburgh: all which was raised and paid accordingly. And a proviso was inserted in the said act, that none of the children of the said Countess of Newburgh, by Charles Radcliffe, born abroad, should claim to be naturalized by virtue of *this* act: which proviso will certainly not take from them the rights, which the former acts of parliament had actually vested in them.

Although it be evident, that this act supposes Lord Newburgh, to be an alien, yet cannot such supposition or presumption of the legislature alter or avoid the effects of prior statutes, which it does not undertake to restrain or repeal: and whatever is enacted upon the ground of such false supposition or presumption, is of itself null and

and void. This will appear clear from the case put by my Lord Chancellor Hatton: * "A nobleman of this realm lately deceased, was attainted *de facto* of high treason, in Queen Mary's time, and in an act of parliament; it was intended to confirm the judgment; and those words were void, because the attainder was void by misrecital: and by consequence for want of jurisdiction in the commissioners; and because it was void, it could not be confirmed, for that, which is weak, may be made stronger, but that which hath no substance, cannot be corroborated: *et confirmare, est illud quod est, firmum facere.* Likewise divers statutes, that should have been continued in parliament, have been misrecited and by that occasion discontinued and dissolved."

So in this case, the act supposes the right of the Earl of Newburgh, to have been extinguished by his foreign

* Hatton in statutes, ubi supra.

birth, and the parliament undertakes to confirm that extinguishment, by procuring the actual consent of the Earl of Newburgh. But if his right was not extinguished *ab initio*, or rather if his right ever had accrued, it is impossible, in the principles of the said learned chancellor, for parliament to have caused such an extinguishment, which it only meant to confirm. For if the parliament meant to create such an extinguishment, or to take out of the Earl of Newburgh the right to be a natural born subject of England, which was actually vested in him, then will neither common sense or common justice warrant any other conclusion, than that he was most infamously deceived, and insidiously treated in the bargain: nothing else can be said of a transaction or a bargain, in which, one party intends to draw in the other, to part with an interest, which he knew not, that he had in him, and which was in no manner expressed in the terms of the bargain. Esau when pressed with faintness and hunger,
parted

parted with his first birth-right, for a mess of broth : but he did it, so far with his eyes open, as to know that he had his *first-birth right* in him : for he saith ; *lo I die, what will the first birth-right avail me?* but the Earl of Newburgh, knew not that he had in him the birth right, and therefore could not be said to have sold it, even as Esau did.

The present Lord Viscount Kin-
naird is the eldest and only son of the Earl, of Newburgh ; he was born in England since the passing of the 22d of George the 2d : either this act supposes the Earl of Newburgh to be an alien or to be tenant in tail male of the premises : if he was an alien, then nothing, which he could do, could affect the premises which he could not hold or enjoy : and then the 24000l is no more than a compassionate relief to his distressed circumstances. If he has any right to the estates in question, it is to be tenant in tail thereof ; which entail he might have barred the

first term after his title accrued : in this supposition, the Earl of Newburgh must be considered as parting with a present interest for about one tenth part of it's value : the respect due to the legislature forbids us on one hand to conclude, that they overreached and misled a distressed man upon false pretences, in an open bargain ; and on the other hand, the very dictates of nature will not permit us to adopt the opposite conclusion, that he voluntarily accepted of £. 24000 instead of £. 200000, for which the estates would have probably then sold.

The Earl of Newburgh is not made an alien by this act, if he was not so by any former act. The doctrine laid down in the foregoing sheets, it is hoped, is conclusive that he is no alien. If then he be no alien, it is clear, that he or his issue cannot be excluded and barred from the possession of the estates comprized in the settlement of 1712, unless it be by reason of this act ; and if it be by reason of this act, then must this act be an actual sale of an estate

tate tail by the tenant in tail, in the first place, for an inadequate consideration, and in the second place, without those legal requisites, which are necessary to vest the fee simple of such an estate in a purchaser; and the act does not undertake to dispense with these necessary conditions of law. To conclude, if parliament will insist upon the validity of the bargain and sale, and enforce the same against the tenant in tail; yet assuredly, the quality of the purchasers shall not alter the legal effects of the bargain, and without the most express words, the legislature shall not be construed to have taken from Lord Kinnaird the right to an estate tail, which must necessarily arise to him after the death of his father, unless the entail shall be barred by those methods alone, to which the law of the land gives sanction and effect. In the case of an indifferent purchaser, such sale would only stand against the tenant in tail for his own life, but would not bar his issue: why then is Lord Kinnaird

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to suffer, because in this instance, the purchasers are the governors and trustees of a public and laudable foundation.

Better ten guilty men should escape than one innocent suffer.

In every act of cruelty or injustice, it is observable, that some fatal inconsistency generally arises on behalf of the injured person, to shew more glaringly to the public, the nature of the injustice done him. Much has been said in the foregoing sheets of the inconsistency of the act of the 4th of George the 2d. It is highly becoming and necessary, that every member of the legislature, as well as of the community, should coolly and impartially attend to the following inconsistencies contained in the 22d of George the 2d. The present Earl of Newburgh, is clearly supposed to be an alien at the time of it's passing, otherwise it would not have been enacted, that nothing therein contained, should be construed to naturalize him or his brother and sisters :

sisters : now if he were an alien, he could have no right in him : and therefore could not extinguish the right of himself or his heirs : for where there is no right, there can be no extinguishment of *right*, as is self evident. Again, this act in one breath, as it were, denies that the Earl of Newburgh is a natural liege subject of his Majesty, and most forcibly enacts him to be such ; it obliges him to enter into a recognizance, *by which he shall be bound to his Majesty, his heirs and successors, in the sum of £. 50000 not to enter into the service of any foreign prince, state, or potentate, in any capacity whatsoever, nor to depart this realm without the licence of his Majesty, his heirs or successors, &c.* The first question, which arises upon this recognizance is, whether any such act of sovereignty can be exercised by our King over any other than his own liege subjects ? The next question is, whether a Frenchman (for if the Earl of Newburgh be an alien as to this country, he is a Frenchman by birth) having

having entered into an engagement, not to serve a *foreign* prince, can be said to have violated his engagement, by serving his own native sovereign, the King of France? And the last question is, whether the King of England, is not to all intents and purposes a *foreign prince*, as to every person who is an alien by our law?

The author of the foregoing sheets confides, that he will be seconded by every british subject, in his wishes and attempt to bring the law to a certainty and the injured to their just rights.

F I N I S.

